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THE EXTENT TO WHICH DEMONSTRATIVE EVIDENCE MAY BE ADMITTED AND IS EFFECTIVE.

A three-cornered contest recently took place between one lay and two legal periodicals over the question stated in the subject of this editorial. *Harper's Weekly* started the controversy by a rather harsh criticism of the action of a certain *nisi prius* judge in a trial for murder, who permitted the exhibition before the jury of a man stripped to the waist with pieces of court plaster upon him to show the places where the deceased had been shot. The purpose of the introduction of the human exhibit appears to have been to convince the jury that a man alleged to have been murdered could not have shot himself in the places shown. The editor of *Harper's Weekly* speaks of the admission of this evidence as a "piece of degrading sensationalism" and as a "brutalizing of public feeling." Our learned contemporary, *Case and Comment*, takes up the cudgel in behalf of the trial court in an equally unconciliatory spirit, and speaks of the editor's criticism as a "rather smart comment on something which he evidently failed to understand." It then attempts to justify the action of the trial court by showing the appropriateness and superiority of ocular demonstration. "Each juror," says our contemporary, "might try to see whether he could hold a pistol so that it would reach a certain place, but he might not be able to tell within an inch or two whether he had reached it or not. The exhibit before his eyes of a person on whom the exact spot is located might convince his mind in a moment so that no elaborate and ingenious argument of counsel could afterwards shake his certain knowledge on that question. The ingenuity of counsel would have a far better chance of confusing a jury when dealing with measurements of distances and inferences therefrom. Actual demonstration, in other words, is much more certain and safe in many instances than mere descriptions given by witnesses."

At this stage of the conflict the *New York Law Journal* entered its appearance and attempted the role of the peacemaker. It agreed with neither of the parties, but endeavored to conciliate both. It expressed a lack of sympathy with the sweeping criticism of *Harpers Weekly* as to the value of demonstrative evidence in general. "The method of ocular demonstration," says our worthy contemporary, "which was aimed at in the trial referred to, is generally to be commended, and the mere fact that incidentally a gaping crowd may be drawn into the court room is no reason for dispensing with an efficient aid in the administration of justice." The value, however, of this character of evidence as proof of the peculiar fact in issue in the case referred to was gravely doubted. "The fact that the exhibit," our contemporary goes on to say, "or a member of the jury, could not have shot himself in any of the places indicated by the court plaster, is certainly not conclusive, nor even strongly presumptive that the deceased person did not shoot himself in corresponding parts of his body. Some men are not able to lace their own shoes, and from this extreme physical incapacity there is a gradually ascending scale of muscular strength and flexibility until we come to the professional contortionist. Evidence of the character in question should be resorted to only in cases of some doubt, and the capacity for self-inflicted wounds would necessarily depend upon the individual."

We have no desire to enter this controversy except to discover, if possible, what, if any, has been the attitude of courts of last resort on the legal questions here involved. Real or demonstrative evidence, and by that we mean evidence addressed directly to the senses of the court or jury without the intervention of testimony, is, as a rule, always admissible. Thus, wounds or other injuries can always be proven by ocular demonstration. City of Lanark v. Dougherty, 153 Ill. 163, 38 N. E. Rep. 892; Citizens' R. R. v. Willoeby, 134 Ind. 563, 33 N. E. Rep. 627; Edwards v. Common Council, 96 Mich. 625, 55 N. W. Rep. 1003; Carrico v. R. R., 39 W. Va. 86, 19 S. E. Rep. 571. Also weapons or missiles of assault or injury. Von Reeden v. Evans, 52 Ill. App. 209; Hornsby v. State, 94 Ala. 55. On these points there is no controversy. As to the uncovering of the human body, however,

some courts have set a limit in attempting to distinguish between decent and indecent exposures. In Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582, the witness was permitted to expose his private parts to the jury. The court said: "No such indecency is ever necessary, or should be tolerated in court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court and expert testimony be given of it."

As to the appropriateness of the introduction of models or of actual experiments in court, as in the incident under discussion, the cases evidence a favorable attitude of the courts respecting their introduction. Thus, in an action for damages for injuries to plaintiff's eye, the use of a skull to explain to the jury the nature of such injury is not objectionable. McNaier v. Railroad, 51 Hun(N. Y.), 644. Small models of defective machinery causing injury are, of course, good evidence to show how the accident could have occurred. Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, 40 N. E. Rep. 938. In the case of Leonard v. Railroad, 21 Oreg. 555, 28 Pac. Rep. 887, defendant claimed that the wreck in which plaintiff was injured was due to a rail thrown across the track by some third party, and introduced a rail in court which showed a scar which defendant claimed was made in the manner stated. The court held that it was not error to allow the plaintiff in rebuttal to produce a wheel and an iron rail of the same dimensions as the rail produced by defendant, and allow witness to demonstrate to the jury that the scar on the rail was not caused in the manner contended. See also Osborne v. City of Detroit, 32 Fed. Rep. 36.

We do not believe it can be disputed that ocular demonstration of a fact or a condition is by far the most convincing evidence. The senses of sight and touch are the most accurate senses of the human mind. Its perceptions and conceptions of fact through these avenues can very seldom be shaken by the most plausible and convincing of arguments. Neither the fact that the exposure of a person's injury or deformity would tend to arouse the sympathy or passions of the jury, nor that a feeling of supersensitive delicacy might shrink from permitting the public exposure of the human form, should be allowed to stand in the way of the introduction of such evidence when important issues are hanging in the balance. Of course, in cases of injury or deformity, this should not be permitted unless it has been proved by evidence *aliunde* that the character of the injury or deformity has not been aggravated or otherwise changed for the worse. In such case the exhibit would convey a false impression on the mind of the jury as to the extent of the injury which subsequent oral testimony as to its original character might not be sufficient to rebut.

NOTES OF IMPORTANT DECISIONS.

ELECTRICITY—NEGLIGENCE PER SE IN PERMITTING WIRES TO BE UNINSULATED CONTRARY TO ORDINANCE.—The deadly effect of electricity and the increasing mortality from its careless use are leading legislatures and courts to demand most extraordinary care from those who handle it. In the recent case of Mitchell v. Raleigh Electric Co., 39 S. E. Rep. 801, the Supreme Court of North Carolina held that where a city ordinance provided that all electric wires should be insulated, any absence of such insulation by abrasion or otherwise, resulting in injury is *prima facie* evidence of negligence. The court said in part:

"The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism—if wire can be classified as such—in common use. In adhering to wire, it gives no warning or knowledge of its deadly presence. Vision cannot detect it. It is without color, motion, or body. Latently, and without sound, it exists, and, being odorless, the only means of its discovery lies in the sense of feeling, communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition. Recognizing this peril to those in its use, or who, in the exercise of their liberty, in passing along the streets of the city, might accidentally come in touch or contact with electric wires, or who, in the management of their buseness affairs, would have other wires suspended over the streets in close proximity to

electric wires, the city authorities of Raleigh deemed it proper to require that all such wires should be covered with durable waterproof insulation. The duty imposed under this ordinance was imperative. Its strict observance was necessary for the safety of all. The electric wires must be insulated, and it was no less the duty of defendant company to keep them so at all times and at all places."

This rule practically makes electric companies insurers at least of the insulation of their wires. We do not think, however, we can find any fault with such a rule. Certainly the same consideration of public policy apply in this case as in that of carriers of passengers, and the dangers to be guarded against are in the one case as in the other more easily under the control of the one who directs the dangerous mechanism.

MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCES DEFINING AND PUNISHING CRIME.—Does a charter power in a municipality to "suppress" a crime give it the right to define and punish it? That was the interesting question discussed in the recent case of Ogden v. City of Madison, 87 N. W. Rep. 568, where the Supreme Court of Wisconsin held that under a charter provision to suppress vice and immorality, the city of Madison had ample authority to declare all homes of ill-fame to be public nuisances and to punish the keepers of such places by fine and imprisonment. The argument of the appellant in this case was that the charter provisions gave the city council no power to enact an ordinance punishing a person for keeping a disorderly house or house of ill-fame; that its power was limited to suppression and restriction. This contention is borne out by some of the early cases. Thus in the case of *In re* Lee Tong, 18 Fed. Rep. 253, the power granted was "to suppress gaming and gambling houses." The ordinance prohibited the playing of certain games of chance and provided that any person violating the ordinance should be punished by fine or imprisonment or both. The court held that the city's charter power "to suppress gaming" did not carry with it the power to define and punish the crime of gaming. So also in City of Mt. Pleasant v. Breeze, 11 Iowa, 399; City of Chariton v. Barber, 54 Iowa, 360, 6 N. W. Rep. 528, 37 Am. Rep. 209. In commenting on the rule announced by these cases the court, in the principal case, said: "It is based upon narrow and technical grounds. It leaves but a mere shadow where substance was necessary. It takes the spirit and the life from the law, and leaves but a feeble and flickering remnant. It must be assumed that the legislature intended that the words of the charter should have their usual and ordinary signification. The following definition of the words 'suppress' and 'restrain' are instructive in this connection: Bouvier: 'Suppress: To put a stop to when actually existing.' Anderson: 'To prevent; never, therefore, to license or sanction.' As to the word 'restrain,' the lexicographers all agree that it means 'to curb; to check; to repress; to debar; to prevent; to hinder.' If these words are to be understood to have the meaning here ascribed to them, then it would seem clear that, when the power to suppress and restrain an act is given, the power to adopt such measures as are essential and incident to such express grant of power must follow. Without it the grant would be barren and futile. If the grant of power to suppress and restrain mean that the corporation may overpower, crush, subdue, and prevent the evil aimed at, then certainly it may affix reasonable penalties for the commission of such act. As suggested by the Iowa court, we know of no better or more effective way of suppressing a disorderly house, or preventing or crushing them out, than to provide a penalty against the keeper. The power to restrain houses of ill-fame would be barren indeed if no means of punishment could be prescribed and enforced." This view of the case is supported by the weight of modern authority: City of St. Louis v. Shoenbusch, 95 Mo. 618, 8 S. W. Rep. 791; Schwehow v. City of Chicago, 68 Ill. 444; Wong v. Astoria, 13 Oreg. 538, 11 Pac. Rep. 295.

CONSTITUTIONAL LAW—VALIDITY OF CITY ORDINANCE PROHIBITING PUBLIC SPEAKING ON STREETS.—Freedom of speech is one of the most fundamental of our constitutional liberities. In England its inviolability has been more than once declared by the courts. In the Sommersett case, 20 How. St. Tr. 1, Lord Mansfield declared that no man could breath the air of Great Britain but his shackles fell from him instantaneously; that he was no longer bound, but free. This decision has been said to be the particular glory of Lord Manfield's judicial diadem. Gradually and insidiously, however, encroachments have been made upon this great essential of all true freedom. Great cities and the tendency toward congestion of population in certain places have made its full enjoyment impossible. Limitations have become necessary in order to give others a share in the same right or in order not to interfere with the rights of others in certain other directions. In the recent case of Love v. Phalen, 87 N. W. Rep. 785, the Supreme Court of Michigan held that an ordinance of the city council of Detroit forbidding the making of any public address in any public place within a half-mile circle of the city hall, without first obtaining permission from the mayor, was a valid exercise of the city's charter right to control and regulate the use of the streets. The court said: "It is said the ordinance is directed against freedom of speech, but this is a mistake. It is simply directed to the method of using a public space, and is no more a curtailment of the right of free speech than would be an ordinance that prohibited the making of public addresses in the corridors of the city hall."

A case similar to this one arose in controversy

over a like ordinance passed by the common council of Boston regulating the right to speak on the Boston Common. The question was over the right to preach the gospel at certain times according to immemorial usage. The court sustained the validity of the ordinance. Commonwealth v. Davis, 162 Mass. 510, 39 N. E. Rep. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389. This case was affirmed in Davis v. Massachusetts, 167 U. S. 526, where the court said: "It is argued that Boston Common is the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city and the public in many ways, and the preaching of the gospel there has been from times immemorial to a recent period, one of these way. * * * For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public places. So it may take the less step of limiting the public use to certain purposes. See Dill. Mun. Corp §§ 393, 407, 651, 656, 666; Commissioners v. Armstrong, 45 N. Y. 234, 243, 244, 6 Am. Rep. 70. It is therefore conclusively determined there was no right in the plaintiff in error to use the common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe. The fourteenth amendment to the constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control (Barbier v. Connolly, 113 U.S.27, 31,5 Sup. Ct. Rep. 357, 28 L. Ed. 923; Railway Co. v. Beckwith, 129 U. S. 26, 29, 9 Sup. Ct. Rep. 207, 32 L. Ed. 585; Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. Rep. 721, 37 L. Ed. 599; Jones v. Brim, 165 U. S. 180, 182, 17 Sup. Ct. Rep. 282, 41 L. Ed. 677), and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state."

JOINT OR SEVERABLE LIABILITY OF MASTER AND SERVANT FOR NEGLIGENCE AS AFFECTING REMOVAL OF CAUSES.

Relative to the removal of causes from state to federal courts on the ground of diversity of citizenship, the law is well settled that, to sustain such removal, the citizenship of all the defendants must be diverse from that of all the plaintiffs.[1] It follows that in a case in which no federal question is involved, and the controversy is not separable, removal will be prevented by the joinder of a defendant whose citizenship is the same as that of the plaintiff, providing the defendant so joined is a real and genuine party, and not nominal, sham or fraudulent. Ordinarily, the plaintiff desires to have the suit tried in the state court, the court of his choice, and the cases based on alleged negligence are not uncommon in which one or more servants of the same state as the plaintiff are made defendants, and the right of a defending master, corporation or individual of another state, to have the case removed to the federal court, is thus defeated or at least put in question. The plaintiff has the privilege of joining a servant as defendant in such a case, even if the sole purpose or motive in the joinder is to prevent removal, providing, of course, that the servant is otherwise a proper party.[2] The defending master is, as a rule, desirous of having the case removed, and in a petition therefor customarily alleges that the servant is an improper, sham or fraudulent party, and that the controversy is separable as to the master and servant. These petitions to remove, the sufficiency of which, when they are in proper form, is usually passed upon in the federal courts on motions to remand, have occasioned numerous judicial findings that are in conflict, and in fact in direct opposition, upon the question as to whether the liability of master and servant for negligence is joint or several. The question is important because it determines the removability of the case. If the liability is joint, no federal question being involved, the case cannot be removed; otherwise, if the liability is severable, in which case any defendant can remove.[3] On a motion to remand the case is to be dealt with as it is made out by the pleadings at the time the petition for removal is filed, the allegations of the plaintiff's bill, declaration or complaint being taken, for the purposes of the inquiry, as confessed, and their truth or the sufficiency of the pleading being in nowise considered.[4] It has been determined by un-

[1] Removal Cases, 100 U. S. 457; Blake v. McKim, 103 U. S. 336; Tracy v. Morel, 88 Fed. Rep. 801; Moore v. Los Angeles I. & S. Co., 89 Fed. Rep. 73.

[2] Deere, Wells & Co. v. C., M. & St. P. Ry. Co., 85 Fed. Rep. 876; Charman v. Lake Erie & W. R. Co., 105 Fed. Rep. 449.

[3] C., etc. Ry. Co. v. Martin, 178 U. S. 245, 59 Kan. 437.

[4] Louisville, etc. R. Co. v. Wangelin, 132 U. S. 603; East Tenn. Railroad v. Grayson, 119 U. S. 240; Graves

questionable authority that where a plaintiff in his allegations charges several defendants as joint trespassers or tort-feasors, the filing of separate answers by several defendants so sued jointly on an alleged joint cause of action in tort, in which answers each defendant avers that he acted separately on his own account, and not jointly in the acts complained of, does not divide the suit into separate controversies so as to make it removable into the circuit court of the United States.[5] Accordingly, in cases where master and servant are joined as defendants, the federal courts, on motions to remand or on appeal from the state supreme court, do not consider the motive of the plaintiff in joining the servant nor the allegations of the defendants in their answers, but they pass upon the merits of the case made out by the plaintiff's pleadings, and determine therefrom whether the liability of the defendants is joint or severable.

The question was carefully considered by Taft, circuit judge, in the case of Warax v. Railway Co.,[6] in which case the plaintiff sued both the railway company and the engineer, charging that the train was negligently started when the plaintiff, a switchman, was between the cars, and the engineer knew, or ought to have known, that the plaintiff was there. After commenting upon the disagreement of authorities on the question whether master and servant can be joined as the perpetrators of a joint tort without the presence of the master and without his express direction, the learned judge delivered a strong opinion holding that the liability of the master is based on the ground of public policy which holds him responsible for the acts of his employees, while the liability of the servant arises wholly because of his personal act in doing the wrong, and that liabilities created on two such wholly different grounds cannot, and ought not to be, joint. He says: "On principle we have no hesitation in taking the view so logically upheld by the Massachusetts courts, and in deciding that a suit against a principal and the agent for the mere negligence of the agent in the absence of the principal is a misjoinder, and that the causes of action are not joint but several."[7]

A case came before Shiras, district judge, in which the plantiff had brought suit against a railroad company and a foreman charging them jointly with setting out a fire and negligently permitting it to spread to plaintiff's land, and in the opinion the reasoning of the Warax case was approved, in so far as it maintained that the plaintiff did not make the defendants jointly liable by relying on two grounds of legal liability, but it was distinctly and unequivocally held that the case under consideration disclosed no separable controversy; that the acts charged were one; that there was one cause of action and the defendants could be sued jointly; that each was chargeable with watching the one fire set for the one purpose, and that the foreman was not a nominal or sham party merely because he was pecuniarily irresponsible.[8] While the doctrine of the Warax case is thus plainly disputed that of the Plymouth Gold Mining Co. v. A. & S. Canal Co.[9] is adopted, wherein it was held that the wrongful pollution of water, with which the defendants were charged, presented a single cause of action and did not constitute a separable controversy, although the defendants answered separately and set up that the acts complained of were committed under the direction of one of the defendants. In

v. Corbin, 132 U. S. 571; Hax v. Casper, 31 Fed. Rep. 499; Barney v. Latham, 103 U. S. 205; Walker v. Collins, 167 U. S. 57.

[5] Sloane v. Anderson, 117 U. S. 275; C. & O. Ry. Co. v. Dixon, 179 U. S. 131; Pirie v. Tvedt, 115 U. S. 41; Louisville & N. R. Co. v. Ide, 114 U. S. 52; Powers v. C. & O. Ry., 169 U. S. 97; Hyde v. Ruble, 104 U. S. 407; Ayres v. Wiswall, 112 U. S. 187; Little v. Giles, 118 U. S. 600; Louisville & N. R. v. Wangelin, 132 U. S. 599; Torrence v. Shedd, 144 U. S. 527; Connell v. Smiley, 156 U. S. 335; Chicago, R. I., etc. Ry. Co. v. Martin, 178 U. S. 245; Arrowsmith v. Nashville & D. R. Co., 57 Fed. Rep. 165; Foster's Federal Practice (3d Ed.), sec. 384; Putnam v. Ingraham, 114 U. S. 57.

[6] 72 Fed. Rep. 637 (1896), adopted and reaffirmed in Hukill v. Mayville & B. S. R. Co., 72 Fed. Rep. 745, in which case Larton, circuit judge, sat with Taft, circuit judge.

[7] In the opinion are cited cases some of which favor and some of which oppose the general proposition, that master and servant or principal and agent can be joined as defendants in an action for a tort. Citations on both sides of the question are given in 15 Ency. Pl. & Prac. 560, 561. See also in this connection Rivers v. Bradley, 53 Fed. Rep. 305; Nelson v. Hennessey, 33 Fed. Rep. 113; Beuttel v. Ry. Co., 26 Fed. Rep. 50; Fergason v. Ry. Co., 63 Fed. Rep. 177.

[8] Deere, Wells & Co. v. C., M. & St. P. Ry. Co., 85 Fed. Rep. 876. For a list of cases holding that master and servant are properly joined as defendants in a negligence case, see Charman v. Lake Erie & W. R. Co., 105 Fed. Rep. 449, 454; Dow v. Bradstreet Co., 46 Fed. Rep. 824.

[9] 118 U. S. 264.

Doremus v. Root [10] the defendant Root was joined with his employer and Hanford, district judge, held that while the obligations of the defendants rested on different grounds, and they were not therefore jointly liable, still the case should be remanded in conformity with the opinion in the case of Powers v. Railway Co.,[11] wherein the doctrine is maintained that an action of tort contains no separable controversy which will authorize its removal merely for the reason that the defendants file separate answers and set up different defenses. In Doremus v. Root the following principles are laid down as established by the previous decisions of the federal courts: (1) in this class of cases the law of torts must govern and the plaintiff may join several as defendants; (2) the defendants cannot divide the cause so as to present a separate controversy and make several lawsuits in the place of one; (3) the plaintiff's complaint or declaration determines the nature of the case, and the defendants cannot change the same by introducing new matters; (4) it cannot be assumed that either defendant is the real party and the other sham or fraudulent, but if fraud is alleged it must be proved.

A comparatively recent case brought this question before the Supreme Court of the United States, and in an opinion written by Chief Justice Fuller, two justices dissenting, it is held[12] that where suit is brought against a railroad company and two servants the controversy is not separable and the state court did not err in retaining jurisdiction. The averments of the complaint are discussed in view of the claim by the defendants, that neither direct nor concurrent nor concerted action on their part was charged, and the conclusion is reached that it was not necessary for the pleader to set forth the specific acts of negligence complained of, and that it was sufficient to aver that the negligence was the joint negligence of all the defendants. It is distinctly held that where concurrent negligence is charged the controversy is not separable. Thus, after much conflict and uncertainty in decisions, definite and final authority is given for the doctrine that the liability of master and servant for negligence is not separable in the sense that a removal to the federal court is allowable on account of their joinder as defendants. Examination of the decisions on the subject shows, that a great part of the confusion arose from the credit accorded the argument, that the master and servant are liable on different grounds, the master on the ground of public policy, in that he is liable for the acts of his agent and the servant on account of his wrongful participation in the wrongful act; that they do not act jointly; that the master is not even present at the commission of the tort, and if he were would not sanction any wrongdoing on the part of the servant; that liability based on such diverse grounds or causes is not joint, and consequently where the defendant's answer separately the controversy is separable. This argument, forceful as it may appear, is not conclusive. It leaves out of consideration the idea of concurrence in a tort and proceeds on the erroneous presumption that a master, for instance a corporation, must be in the company of a servant in order that their negligent acts may concur. In order that two or more defendants may all be liable for a tort, it is not necessary that they act in unison. A railroad collision occurs and two or more companies may be at fault, and, therefore, liable, although they acted in no respect together or jointly. They could be joined as defendants and no one would argue that the controversy was separable so as to allow removal. The case of master and servant is the same. They may not act together and still both be liable, their respective acts of negligence concurring in causing the injuries complained of. This is the controlling consideration: a separable controversy is inconsistent with concurrent negligence. A plaintiff is not compelled to bring as many suits as there are parties whom he believes are liable. He could not get justice were he obliged so to do. He is privileged to join several defendants whether they acted together or separately, and as a rule the same evidence and the same trial will dispose of the case as to all defendants. In fact the plaintiff might not be able to try the case as to one defendant without the presence of the others as parties or witnesses. The act relating to separable controversies reads, "there shall be a controversy which is wholly

[10] 94 Fed. Rep. 760.
[11] 169 U. S. 92 (1899).
[12] C. & O. Ry. v. Dixon, 179 U. S. 131.

between citizens of different states and which can be fully determined between them." It is submitted that an action brought to recover for injuries caused by the concurrent negligence of several parties cannot be fully determined between the plaintiff and one of those parties.

Whatever the reasoning by which the result has been reached, the great weight of present authority is that the liability of master and servant for negligence is not separable, and the plaintiff may prevent the removal of his case to the federal court by joining as defendant a servant who is a citizen of plaintiff's state. As the authorities herein quoted and cited show, the motive of the plaintiff in joining such a defendant is immaterial. If the declaration or complaint shows that the servant is a proper party, the state court has a right to retain jurisdiction of the case or, if the case is removed, the federal court is bound by prevailing authorities to remand it on proper motion. Should the plaintiff discontinue the suit as to the servant or servants who are citizens of the plaintiff's state, it is the privilege of a citizen of another state who is defending, when the case is thus made removable, to file a petition to remove immediately before taking any other steps in defense;[13] but if the plaintiff insists on prosecuting the suit on the joint cause of action set out in the complaint against all the defendants, he is not compelled to sustain his allegations as to the liability of the defendants of his own state in order to prevent removal.[14]

Chicago. CYRUS J. WOOD.

[13] Powers v. C. & O. Ry., 169 U. S. 92.
[14] Whitcomb v. Smithson, 175 U. S. 635.

TELEPHONE COMPANIES—PRIVATE SERVICE—RIGHT TO REFUSE.

STATE v. KINLOCH TEL. CO.

Court of Appeals, Missouri, March 18, 1902.

1. A telephone company sustains such relations to the citizens of the territory in which it operates that it is bound to enter into a contract with a citizen to furnish him private service when requested and accompanied with an offer to pay the usual charge in advance; and where an instrument has been removed, and the customer is solvent, and it is fairly doubtful if any back rent is due, or the subscriber has paid for all the actual former service rendered, it cannot exact as a condition that it be made whole for back rent claimed and the cost of the reinstallation; and the fact that it maintains public toll stations for the use of the general public would not justify its refusal to furnish service.

2. When a telephone company unjustly refuses to furnish a customer with service, *mandamus* will lie to compel it to do so.

GOODE, J.: An alternative writ of *mandamus* was issued at the instance of appellants commanding the respondent to rent to the appellants a telephone instrument, and place the same, together with the usual appurtenances, in their building, connect it with the wires of the respondent's telephone system, and so maintain it as to afford the plaintiffs the customary facilities for receiving and transmitting messages over the wires of the respondent throughout the city of St. Louis, or show cause to the contrary. In March, 1900, a contract was made by the parties, under which appellants subscribed for an instrument to be placed in their business quarters. Appellants paid the hire of the telephone for which they subscribed until the 1st day of October, 1900, it seems, or two quarters. It worked badly, and messages could not be received or transmitted over it satisfactorily. Appellants complained of its defects from time to time, and attempts were made to put it in good working order, but without success, until about the 15th day of December. In the meanwhile appellants became so dissatisfied with the appliance, and tired of waiting for it to be adjusted properly, that they notified the respondent on the 31st day of August—that is, a month before the expiration of the time for which they had paid, to remove it. Respondent disregarded several notices of this kind, and on the 15th day of December the instrument was finally adjusted so that it rendered good service, and the appellants were willing and desired to retain the use of it, and so notified the respondent, tendering them on the 3d day of January the sum of $15 for the quarter next ensuing and offering to pay them $5 for the service during the time the instrument had been efficient prior to said date. Respondent demanded pay for the entire time the instrument had been in appellants' house, regardless of whether it worked or not,—that is, insisted on being paid for the time from October 1st to December 15th,—though there was no evidence tending to prove the telephone was of any use to the appellants during that interval. In spite of said tender and appellants' notification that they wished to retain the instrument after it became efficient, respondent removed it on the 4th day of January, 1901, and has since that time refused to restore it unless paid for all the time it was in the building at the usual rates. The claim is put forward that one rule of the company is not to reinstate a telephone which has been removed for non-payment of rent until all back payments have been made and the cost of reinstallation, amounting to $17, also paid in advance (although the latter item was waived by the manager or superintendent of the company in this instance). The alleged rule in regard to when an instrument will be restored

to a subscriber or reinstated on his premises is not among any of the printed rules of the company furnished to subscribers, nor is it in the form of a printed rule at all, nor was it communicated to appellants when they made the contract with the respondent, or ever communicated to them until they demanded a continuance of service by the respondent.

The facts in this case are undisputed, the precise issue being whether or not the respondent is bound to install a telephone on the appellants' premises on their demand and tender of one quarter's rent in advance, plus the unpaid rent for the time they enjoyed good service by the other telephone; and whether, if there is an obligation of that kind on the respondent, it may be enforced by this remedy. Such a controversy might often turn somewhat on the regulations of the telephone company, its contracts with customers, and the behavior of the latter while using the telephone system. But, aside from the special circumstances that may arise in any case, a larger question is raised by the return to the alternative writ of *mandamus* in the present one, namely, whether the respondent, or any other telephone company, sustains such a relation to the citizens of the territory in which it operates its system that it is bound to enter into a contract with a citizen to furnish him telephonic facilities when requested and accompanied with an offer to pay the usual charge in advance. Notwithstanding the recency of the use of telephone communication as an aid to the transaction of social and commercial affairs, that use has increased with so much rapidity, and has become so widespread, that this question has been already presented to and passed on by the courts several times, and passed on, too, without much doubt, or difficulty; for the principle involved and to be applied to the solution of the question was well settled. Telephone companies have been held from the first to be common carriers in the sense that they are bound to furnish service to any one offering to comply with their reasonable requirements, not only in respect to their public stations system, but also as to the so-called private system of instruments installed in offices, residences, and places of business. State v. Bell Tel. Co. (C. C.), 23 Fed. Rep. 539; State v. Delaware & A. Telegraph & Telephone Co. (C. C.), 47 Fed. Rep. 683; State v. Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583; Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co., 66 Md. 399, 7 Atl. Rep. 809, 59 Am. Rep. 167; Bell Tel. Co. v. Commonwealth (Pa. Sup.), 3 Atl. Rep. 825; Hockett v. State, 105 Ind. 250, 5 N. E. Rep. 201; Telephone Co. v. Bradbury, 106 Ind. 1, 5 N. E. Rep. 721; Central Union Tel. Co. v. State, 118 Ind. 194, 19 N. E. Rep. 604, 10 Am. St. Rep. 114; Same v. State, 123 Ind. 113, 24 N. E. Rep. 215; State v. Bell Tel. Co., 22 Alb. Law J. 363; State v. Nebraska Tel. Co., 17 Neb. 126, 22 N. W. Rep. 237, 52 Am. Rep. 404. In the cases above named the duty of an incorporated company operating a telephone system in a certain locality to treat all citizens of that locality alike, and to give them all equal privileges in regard to the use of the system by entering into contracts with them and installing instruments on their premises, is recognized and upheld, as well as the power of the courts to compel the observance of this duty by a writ of *mandamus*. Some of the decisions are founded on statutes more or less positively prescribing the duty, and others on the common-law rule that a common carrier, or other company or person holding itself out as ready to serve the public at large in some business intimately and essentially associated with the general social and business life of the community (especially if such person or company is operating under or enjoys some advantage or franchise from the state), is bound to serve every member of the community without discrimination or partiality; and some of the decisions which are supported by a statute declare the power to enforce the obligation would exist, if there was no statute, by virtue of the principles of the common law, of which the statute is said to be declaratory. Telephone Co. v. Bradbury, *supra*. The duty thus imposed on telephone companies is in no sense novel, nor did its application to them involve a new principle; for their business plainly falls, by its very nature, within the class of *quasi* public employments, as to which the courts have never hesitated to restrict in some measure the right of contract for the common welfare and upon considerations of public policy. Telegraph and telephone companies are regarded by the courts as performing functions similar to those of railway, steamboat, and express companies, which conduct a general carrying business, and have always been subject to government supervision and regulation exercised both by legislation and judicial decisions. Vincent v. Railroad Co., 49 Ill. 33; Buffalo E. S. R. Co. v. Buffalo St. R. Co., 111 N. Y. 132, 19 N. E. Rep. 63, 2 L. R. A. 284. Indeed, the same abridgment of the right of contract is applied to other persons or corporations than carriers, if engaged in employments of a public character, such as innkeepers, warehousemen, mills, bakers, gas and water companies, and perhaps still others. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; People v. Budd, 117 N. Y. 1, 22 N. E. Rep. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468, 36 L. Ed. 247; American Waterworks Co. v. State, 46 Neb. 194, 64 N. W. Rep. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610; Smith v. Telegraph Co., 42 Hun, 454; State v. Joplin Waterworks, 52 Mo. App. 312; Shepard v. Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479; People v. Manhattan Gaslight Co., 45 Barb. 137; Waterworks v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. Rep. 857, 38 L. Ed. 757; Mayor, etc. v. Yuille, 3 Ala. 137, 36 Am. Dec. 441. Most of such cases deal with the constitutionality of statutes passed to regulate and control the conduct of certain em-

ployments; others were interferences by the courts by writs of injunction or *mandamus*. It is impossible to exact from them any one principle which will explain and support all the decisions in which the circumstances were held to warrant a restraint on a defendant's right to conduct his business as he pleased, or every one in which they were held insufficient and relief was denied. Ponderous reflections on the opposed political theories of liberty and paternalism, with which they abound, serve too often only to disclose the intellectual bias of the judge who wrote the opinion, while constructions of constitutional powers and limitations have produced haphazard and contradictory results, depending more on whether the deciding tribunal deemed the regulating statute reasonable and wholesome or meddlesome and mischievous than on its clear violation of a constitutional inhibition. In fact, our fundamental principles are not threatened or questioned in any of these curtailments by courts or legislatures of unhampered individual action, because they are made to subserve, rather than destroy, free contractual rights, since they commonly are directed against extortionate or arbitrary conduct by persons, corporations, or combinations either possessing or thought to possess some monopoly or other advantage enabling them to dictate terms. That is the motive of enactments and the reason of decisions of this character, and the vital question seems to be always, whether any particular interference is justified by the existence of a condition which precludes the members of a community from negotiating for fair terms, or forces them to dispense altogether with the service rendered by the party complained of (although their welfare imperatively requires that service), unless relieved by the interposition of the public authorities. Abuses of the contract right must now and then be corrected, and they will require correction more frequently as population grows dense and commercial activities multiply.

The right to interfere by statute or judgment is placed on several grounds: First, the bestowal by the state of some extraordinary franchise or attribute, under which the party to be restrained is operating,—as in the case of railway and other companies enjoying the right of eminent domain; second, the possession of a legal monopoly, either directly granted by the state or developed from a privilege granted by it,—like licensed state lotteries and railway pools; third, possession of a virtual monopoly on account of the nature of the business,—like the warehouses whose charges were held to be subject to regulation by government in People v. Budd, *supra;* or, fourth, simply because the business is one which closely concerns the public welfare,—like inns or grain elevators, as in Brass v. North Dakota, *supra*. An examination of the decisions shows that the right to curtail freedom of contract by compulsory measures on the part of the sovereignty through any of its branches is not exclusively nor always exercised in either of those instances,—neither where the party restrained is the donee of a valuable franchise, nor where a monopoly, legal or actual, exists, nor where the party against whom relief is invoked operates a business of great magnitude, and heavily influencing the prosperity of the community,—yet at the same time has been exercised in all such cases. In other words, the ground of this public interference with business affairs is not well settled; but the underlying principle is the right of the people, acting through their legislative representatives or their courts, for the good of the commonwealth, to set bounds to the arbitrary conduct of a natural or corporate person or combinations of either, whenever that conduct becomes intolerably oppressive and mischievous; while at the same time conceding to everybody the prerogative to make such contracts and enter into relations with such persons as he chooses inside those bounds. In this state the rule has been declared that the magnitude of a business is not cause for compelling its proprietor to assume relations with or serve a citizen against his will,—in other words, to direct or control him,—but that relief of that kind can be afforded only against parties whom the state has enabled to obtain a monopoly, or put in a position to oppress their fellow citizens by the donation of a special privilege, or where the business is *quasi* public, or the property used in conducting it has been dedicated to public use; and so it was held in State v. Associated Press, 159 Mo. 410, 60 S. W. Rep. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368. But that authority distinctly recognizes the doctrine that a corporation endowed with the power of eminent domain, or engaged in a public avocation, may be regulated and controlled in reasonable limits. So the respondent telephone company is plainly amenable to regulation if it acts arbitrarily and unconscionably against a citizen, for it may exercise eminent domain, and has dedicated its property to the use of the public.

Respondent's justification for refusing to hire appellants a telephone and the use of its wires and current must, then, be found, if at all, in the special circumstances of this case; and in truth we understand that is its serious contention, rather than that it may permit or not, at its pleasure, the use of its so-called private system of instruments, for in its brief we find this statement: "Here the question is not whether the appellants shall be served, but whether they shall be served without compliance with, and in defiance of, respondent's reasonable rules and regulations." Two complete answers may be made to the question thus propounded: First, no rule or regulation of the company is shown to have been defied or violated by the appellants. The alleged rule that an instrument once taken out for nonpayment of rent would not be reinstalled until back rent was paid was not mentioned in the contract between these parties. It was not among the company's printed rules, and the appellants were

never apprised of its existence until they asked the company's superintendent for renewed service. It is nonsense to term such an exaction a rule. A rule or regulation, in a proper sense (if it is neither a law of the land binding on every one, nor a judicial order binding on some designated person), in order to affect the rights of parties in their dealings and relations, must be known to them, and either expressly or impliedly assented to as part of the particular contract or transaction in reference to which it is invoked. If this alleged regulation had been communicated to these appellants when they made the contract, with the respondent, they might have been held bound by it, if just. But merely notifying them afterwards that it was customary to require pay for back service before restoring a telephone was nothing more nor less than a term or condition prescribed by the respondent on compliance with which they would serve the appellants,—no rule at all. That requirement or exaction was rejected by the appellants, and they had a right to reject it unless it was lawful. Was it? We think it was not, and that is the second answer to the question respondent propounds. Without deciding whether a previous failure to pay rent, either from dishonesty or inability, would justify a telephone company in refusing to again install an instrument removed on account of the default until it was made whole for the back rent and cost of installation, we do decide and hold that when the customer is solvent, and it is fairly doubtful if any back rent is owing, or, as in this case, when the subscriber has paid for all the service he got (and there is practically no testimony that these appellants owe anything, while they are shown to be financially responsible), a company cannot insist on that condition,—cannot be judge in its own case, and decide the dispute. The appellants paid rent to the 1st day of October, but, as the service was a failure, notified respondent to remove the instrument at the end of the quarter. Instead of doing so, it let it remain and tinkered with it until the middle of December, when it began to work well. Then appellants wished to have it, offered to pay rent in advance, and to pay from the day it became efficient. Their request was refused unless they would pay for the time the machine rendered no service. Could anything be more unjust? Respondent's contract included, of course, the rendering of reasonably good telephone service. It failed to keep this obligation, and yet insisted on full payment. If, in fact, fair service was rendered during the time in dispute, the company has a good case to collect rent for that time (Webster Telephone Case, 17 Neb. 126, 22 N. W. Rep. 237, 52 Am. Rep. 404), but cannot arbitrarily cut off appellants from a hearing, and force them to submit to its terms or do business without a telephone. The facts of cases wherein a company or individual bound to serve the entire community seeks to withdraw service from some customer on account of defaulted payments or other omission to comply with his contract must be attended to and if it is apparent that no good cause exists for the withdrawal, and that the defendant will not be harmed by compelling it to continue to supply the customer, it should be compelled; otherwise the remedy of *mandamus*, which all authorities agree may be invoked in such cases, will prove useless. Rules actually embodied in the contract between parties, more just and reasonable than respondent's alleged rule, have been adjudged unreasonable and void; notably one which provided that the defendant company might remove the instrument (in that case a "stock ticket") from the plaintiff's office and discontinue the service, without notice, whenever the company deemed the customer had violated any of the conditions of his contract. This rule or stipulation was repudiated, because it allowed the company to arbitrarily pass on the customer's rights. Smith v. Telegraph Co., 42 Hun, 454. Nor does the fact that the respondent company provides public stations for the use of every one who will pay toll constitute a defense. It must furnish private service in residences and offices when asked, for in that way only can all persons be assured of equal privileges. Central Union Tel. Co. v. State, 118 Ind. 194, 19 N. E. Rep. 604, 10 Am. St. Rep. 114; Same v. State, 123 Ind. 113, 24 N. E. Rep. 215. The facts in this case are uncontradicted, and the lack of declarations of law is therefore immaterial, if they would be otherwise necessary.

From the considerations above stated, it results that the judgment must be reversed, and the cause remanded, with a direction to the lower court to grant a peremptory writ of *mandamus* to the plaintiffs for the relief they ask.

Bland, P. J., and Barclay, J., concur.

NOTE.—*Right to Compel Telephone Companies to Furnish Service.*—One of the most important phases of the question involved in the subject of this annotation arose very early in the use of this invention. The Bell Telephone Company and the Western Union Telegraph Company were originally the owners of rival telephone patent, and for some time engaged in litigation over their respective rights. In 1879 they compromised their differences by an agreement under which the Bell Telephone Company was given undisputed control of all the telephone patents on condition that the Western Union Telegraph Company be granted an *exclusive* license to use the telephone in the receiving and transmitting of telegraphic messages. The Bell Telephone Company then licensed its patents to different parties in different parts of the country with the limitation as to the use to be granted telegraph companies other than the Western Union. This limitation immediately provoked litigation. State v. Telephone Co., 36 Ohio St. 296, 38 Am. Rep. 584; Commercial Union Teleg. Co. v. Teleph. Co., 61 Vt. 241, 15 Am. St. Rep. 893; Chesapeake, etc. Co. v. Telephone Co., 66 Md. 399; State v. Bell Telephone Co., 23 Fed. Rep. 539, 10 Cent. L. J. 438; State v. Delaware, etc. Telephone Co., 47 Fed. Rep. 633. These cases held that a telephone company had no right to limit its use unreasonably, even though it may be only the licensee of a patent in

whose hands the use had been so arbitrarily limited. The case of American Rapid Tel. Co. v. Telephone Co., 49 Conn. 352, 44 Am. Rep. 287, is the only case announcing a contrary rule. In this case the licensee was granted the use of the patent on condition that the Western Union Telegraph Company should have a monopoly of all telegraphic transmissions. The court held that the licensor, owning the patent, had a right in granting licenses for its use, to impose whatever restrictions it chose; that the licensee, therefore, acquired a right only to the restricted use of the patented device, and its duty to the public did not extend beyond that restricted use. This argument, however, is not generally accepted, and fails to give importance to the fact that a common carrier, like a telephone company, cannot avoid the performance of its paramount obligations to the public by any contract obligations it may enter into. In rather humorous contrast to these cases is that of People v. Telegraph Co., 166 Ill. 15, 46 N. E. Rep. 731, where the facts are completely reversed. In this case a telephone company sought to *mandamus* the Western Union Telegraph Company to permit it to place a telephone in its office to enable subscribers to the telephone company to use its line in receiving and transmitting telegrams. It appeared that the telegraph company was under contract with the Bell Telephone Company to use its service exclusively for this purpose. The court held that the fact that a telegraph company has an arrangement with one telephone company, whereby verbal messages are transmitted and received over the telephone line, does not operate to prevent it from refusing to receive or to deliver verbal messages over the line of another telephone company.

As to whether a failure to support such contracts violated any rights of the patentees was fully disposed of by the court in the case of State v. Delaware, etc. Telephone Co., *supra*, where the court held that the patented device having been employed for a public use by a common carrier in the prosecution of its business, every one was entitled to use it on the same terms as others in the same class. This is in line with the leading case of Patterson v. Kentucky, 97 U. S. 501, where the applicant had been convicted in a state court of selling an improved burning oil, of which he was the inventor, and which had been condemned by the state inspector as unsafe, but which the appellant claimed he had a right to sell by virtue of letters patent issued to him by the United States. The supreme court, speaking through Mr. Justice Harlan, said: "The right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the states have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few."

It is well settled that telephone companies are common carriers, at least to a limited extent. They must serve the public without discrimination; the business being affected with a public interest, is therefore subject to interference by the legislature and by the courts. The celebrated case of Munn v. Illinois, 94 U. S. 113, shows how private property may become dedicated *sub modo* to public use, and thus be brought under public control. "When, therefore," says the court in this case, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public, for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control." The law as announced in Munn v. Illinois was afterwards applied to telephone companies in Hockett v. State, 105 Ind. 250, in which the Supreme Court of Indiana upheld a statute of that state limiting the rent to be charged for the use of a telephone to a sum not exceeding three dollars per month. The court held that a telephone company was a common carrier in the same sense as a telegraph company, its instruments and appliances being devoted to a public use, so that the legislature of a state could prescribe the maximum charges for its services.

A telephone company must not be unreasonable in its conditions, nor arbitrarily refuse service. In Central Union Telephone Co. v. Falley, 118 Ind. 194, 10 Am. St. Rep. 114, it was held that telephone companies must furnish each person applying with a telephone and telephonic communications and connections, and cannot relieve themselves from their liability so to do by abandoning what is known as the exchange and rental system and substituting therefor another system, under which all persons must resort to stations fixed by the companies where telephones are kept to be used upon the payment of a certain toll. A peculiar instance of discrimination arose in the case of Central Union Telephone Co. v. Fehring, 146 Ind. 189. It appears that in Indiana there is a statute imposing a penalty of $100 upon every telephone company guilty of discrimination. In this case appellee had one of appellant's telephones, and desiring to converse with a certain person called upon the exchange and asked to be connected with said other person, which connection was refused. The court held that this amounted to a discrimination for which the penalty could be recovered. It is evident from this decision that telephone companies are not only required to furnish the applicant the instrument and properly connect the same with its exchange, but is also their duty to supply all the connections and facilities necessary to the use of such instrument.

Mandamus is a proper remedy for the refusal of a telephone company to hire its service. Central Union Telephone Co. v. Falley, 118 Ind. 194, 10 Am. St. Rep. 114; State v. Nebraska Telephone Co., 17 Neb. 126; Chesapeake, etc. Telephone Co. v. Telegraph Co., 66 Md. 399; State v. Telephone Co., 36 Ohio St. 296. Only one case stands out as opposing this rule,—that of *In re* Baldwinsville Telephone Co., 53 N. Y. S. 574, where it was held that under an act making it the duty of telephone corporations to receive and transmit messages to and from other telephone companies, *mandamus* would not lie to compel a telephone company to place an instrument for the reception or transmission of messages in the office of another telephone company, or to compel the transmission of a message over its wires, there being another adequate legal remedy. In this case it appeared that the statute permitted a recovery of $100 as a penalty for such refusal. We think, however, that the court utterly mistakes the proper rule of law in such cases. Undoubtedly, the *only* adequate remedy is by *mandamus*. It is the service that is desired, and very often the refusal of such service incurs damages and annoyances to the applicant which, while serious, are difficult to estimate. The mere fact that the legislature imposes a penalty for refusing to furnish such facilities does not take away the right to *mandamus*.

The statutory remedy is merely cumulative. Central Union Telephone Co. v. Failey, 118 Ind. 194; State v. Nebraska Telephone Co., 17 Neb. 126.

The case of State v. Nebraska Co., *supra*, is one of the best argued of all the cases on this question. The facts are similar to those in the principal case. The relator, an attorney, applied for service from appellant telephone company. All connections and appliances were furnished with the exception of a directory. Finally the directory was furnished, but upon pay day the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instruments were removed. Subsequently, relator again applied for service which was refused. On *mandamus* the court held relator entitled to service whether he paid the old bill or not, provided he tendered a full compliance with the rules of the company. The court said: "If relator is indebted to respondent for the use of its telephones, the law gives it an adequate remedy by an action for the amount due. If the telephone company has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not alone relieve it from the discharge of those duties."

JETSAM AND FLOTSAM.

A NEEDED REFORM IN THE ILLINOIS JUDICIARY.

With all the increasing agitation for more strict regulations concerning requirements for admission to the bar, a peculiar situation exists in Illinois in regard to the judiciary. A judicial position is regarded everywhere as the crown of those who by study, toil and perserverance have equipped themselves for the law and its practice and kept abreast of the times, yet in Illinois, through some oversight, perhaps, it is possible that men may be elected to the position of county judge for no other reason than a political exigency. A high standard at the bar could never be maintained were the bench to be so made up, but the wisdom of the voters can generally be trusted to readily perceive that the office of county judge occupied by one not a thoroughly equipped lawyer and student, and by one who has not forfeited himself by practice in the courts is exceedingly dangerous, yet it might occur. By statute it is provided that only a licensed attorney shall be permitted to practice in a court of record, yet a loophole exists whereby a man may be elected judge of a court in which he could not practice! ! ! A presiding officer over men with whom he would not be permitted to contend in the same court in the interest of a client ! ! ! What is more absurd?

The judiciary is the fountain source of the law. It is the judiciary of the nation that has given us the undying names of Marshall and Story, and in Illinois they have Breese, Schofield and Phillips, and a host of others; yet it is overlooked that our supreme court cannot be the pride of not only the bar, but the masses if the foundation is not right, and the structure of the judiciary reared of the best material throughout. Blackstone early laid down the proposition as to the needed equipment for the bench, yet the law is now such that some political huckster might gain this extremely important place. The legislature should make no delay in declaring that only those who have been admitted to the bar, shall occupy this position, as it has the office of states attorney over whom the county judge in many cases must preside. There are other officers for the chronic feeders at the public crib, they might fill without a legal education, but the bench should be out of their reach. Voters readily realize the folly of a proposition involving the hiring of an engineer to act as their family physician, or a carpenter as a veterinary surgeon; yet, through partisan politics they may commit a no less serious error in electing a judge no more equipped for the place than the engineer would be as their family physician. A generation past, a justice of the peace by shutting both eyes, coupled with main strength, may have been able to flounder around in the county judge's chair and struggle through somewhere, and his mistakes remained undiscovered until his term of office had expired and the heirs of a misadministered estate right themselves only by long drawn out and expensive litigation; but with the growth and importance of this office, the legislature constantly extending its powers and widening its scope, its unlimited jurisdiction over probate matters, chancery powers in certain cases, the growing practice of certifying cases from the circuit to the county court, its position of supreme importance to the taxpayer by reason of its jurisdiction in matters of special assignment and collection of taxes, drainage matters, election matters, etc., it has, as the supreme court has said in 155 Ill. 660 given it, in its sphere "a jurisdiction as general as that of the circuit court. Forty-five per cent. of the cases appealed to the supreme court hinge on propositions of practice. With this fact in view it is possible to have a judge presiding over the county court who would not know a demurrer from a barn door or a plea of set off from a replication! ! Years ago an Illinois county placed a worn out ex-justice of the peace on the bench and his first case was a criminal one. A verdict of guilty was returned and defendant's lawyer demanded a "poll of the jury." Floundering and muttering to himself a few moments he finally gasped "What the h——is that?" This is a true tale, the story being completed by one of the jury confessing that he had signed the verdict because he "was told that he had to."

To elect as judge of the county court, men not lawyers in each county throughout the state would not be tolerated. Why leave the bars down anywhere? Lawyers can gain neither fame, reputation nor business in a court where they have to run their chances on the court guessing whether it is an information or an affidavit for continuance, before a court that knows no more law than the client, and it is their duty not only to see the law is changed, but to convey the information to the public, in no uncertain terms, that estates and many and varied property interests are unsafe unless men, not only of highest integrity, but men equipped in legal learning occupy the bench, and that the county court is not a toy, but a most important part of the machinery of government.

It is no disparagement of the talents of the laity or a reflection on their intelligence to assume that without constant, energetic and studious legal training, they are unqualified and unfitted for the bench. In these days, as in the past, a "jack of all trades" is a burden to society. The mastery of one profession is a life work, and a lawyer who has made a success of his profession would in nine cases out of ten be a failure, as the presiding genius of a banking, mercantile or manufacturing industry or in agricultural pursuits. If a man has mastered one trade, profession or calling it is in that he should be elevated, and if he has failed in these much more, is it the reason he should be kept as far away from the judicia

ermine as possible, and not pensioned for his failure in life at the expense of the public.

Chicago, Ill. J. A. VROOMAN.

BOOK REVIEWS.

THE RIGHT TO AND THE CAUSE FOR ACTION.

The lawyer who can look back upon the days of his student career in which he waded laboriously through some impenetrable treatise on common law pleading, or, probably more lately, some equally obtuse work on the principles of code pleading, will be surprised to learn that a thread of scientific principle has been discovered which brings together in beautiful harmony what seemed to be one of the most complex and unscientific questions in this technical subject. The great discoverer is the Hon. Hiram L. Sibley, LL. D., Circuit Judge for the Fourth Circuit of Ohio, the author of the book which we have taken as the subject of this review. In view of the importance of the discovery the author speaks of the results of his studies in this direction with not unbecoming immodesty. "The judicial power," says Mr. Sibley, "is that by which the laws of remedy is made efficacious, and courts of judicature are its chief agencies to this end. Before them, however, redress for wrongs becomes primarily a question of procedure. A chief feature in that is to show a cause for, and a right to, judicial action. The former is fundamental to relief in all suits, civil or criminal. Yet, in no book, nor in the cases touching the matter, has the problem of what constitutes a *cause* for action been fully analyzed and worked out; and, until shown by myself, the distinction between that and a *right* to action never was clearly, or its basis perceived." Mr. Sibley's personal contribution to the solution of this question, in addition to the little book that is now offered to the profession, was his carefully prepared opinion in a *nisi prius* case decided about twelve years ago involving this question. This case is reported in 22 Ohio Law Bull. 53, and is the only case referred to on the subject of the right to action in the new Century Digest (see vol. 1, 1095). The whole secret of the author's discovery is a well stated case in the following language with which he closes his opinion: "Neither the substantive law nor that of remedy, nor both, *per se*, give a *right* of action to anyone. Only when some *act* has been done which violates a *duty* under the former, and so makes a *wrong*, in legal sense, can there be any actual right of action? But the wrong being done, from the law of remedy the right *ipso facto* arises. Is it not then perfectly clear that the wrong, and it alone, is the *cause* of action." The vindication, elaboration and illustration of this idea is the *raison de, tre* of this first effort of a new but promising law writer seeking admission to the ranks of that class of legal authors represented by Mr. Bishop and others of the controversial or argumentative school. The book is a small 12mo. edition of 165 pages and bound in cloth. Published by W. H. Anderson & Co., Cincinnati, Ohio.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

1. AFFIDAVITS.— Where the officer before whom a lien claimant verified his claim was a clerk of a court of record in a sister state and empowered by law to administer oaths, the verification is sufficient.—Genest v. Las Vegas Masonic Bldg. Assn., N. M., 67 Pac. Rep. 743.

2. ALTERATION OF INSTRUMENTS—Filling in Skeleton Note.—Where a part of a contract was in the form of a skeleton note, the detachment of such part, and subsequent filling of the blanks, to make a negotiable note, held a material alteration, rendering the same void.—Porter v. Hardy, N. Dak., 88 N. W. Rep. 458.

3. ASSAULT AND BATTERY—Proper Indictment.—An indictment for an assault and the infliction of serious bodily injury, charging an assault "thereby inflicting serious bodily injury," is not bad in not charging that defendant "inflicted" such injuries.—Yeary v. State, Tex., 66 S. W. Rep. 1106.

4. ASSAULT AND BATTERY—Provocation.—Although provocation and insults may be considered in mitigation of damages, they cannot justify an assault.—Daniel v. Giles, Tenn., 66 S. W. Rep. 1128.

5. APPEAL AND ERROR—Failure to Discuss Exception.—The failure of counsel for appellant to discuss an exception taken to the trial court's denial of an order requiring further answers to interrogatories constitutes a waiver thereof.—Citizens' St. R. Co. v. Stockdell, Ind., 62 N. E. Rep. 21.

6. APPEAL AND ERROR—Failing to File Brief.—Where an appellee fails to file a brief, and there is no showing that the neglect is excusable, the judgment will be reversed, without prejudice to either party.—Neu v. Town of Bourbon, Ind., 62 N. E. Rep. 7.

7. APPEAL AND ERROR—Failure to Give Reason for Exceptions.—Assignments of error as to rulings on examination of witnesses, referred to in the brief as errors in the examination of a certain witness, without reasons as to why the rulings were erroneous, will not be considered.—People v. McLean, Cal., 67 Pac. Rep. 770.

8. APPEAL AND ERROR — Incompetent Evidence.—Judgment will be reversed for admission of incompetent evidence on trial by court where such evidence is the sole basis for the judgment.—Merchants' Nat. Bank v. McDonald, Neb., 88 N. W. Rep. 492.

9. APPEAL AND ERROR—Judgment Notwithstanding Verdict.—Where a judgment is entered notwithstanding verdict on a trial court's finding that defendant is entitled to judgment on the pleadings, the pleadings only will be considered on appeal.—Barge v. Haslam, Neb., 88 N. W. Rep. 516.

10. APPEAL AND ERROR—Laches.—A party may have a statement on motion for a new trial settled after time has expired by showing that he is not guilty of laches or that his neglect is excusable.—Hoehnan v. New York Dry Goods Co., Idaho, 67 Pac. Rep. 796.

11. APPEAL AND ERROR—Remittitur.—Where a judgment has been reversed, and *remittitur* gone down to the lower court, the *remittitur* cannot be recalled on the ground that an alleged adverse party was not made party to the appeal.—Richardson v. Chicago Packing & Provision Co., Cal., 67 Pac. Rep. 769.

12. APPEAL AND ERROR—Right to Appeal from Order

Reciting Compliance.—Plaintiff has no right of appeal from an order reciting compliance with a conditional order setting aside a default judgment, and ordering that such judgment be set aside, where he has before accepted compliance with the condition.—San Bernardino County v. Riverside County, Cal., 67 Pac. Rep. 1047.

13. ATTACHMENT — Wrongful Attachment.— Where property is wrongfully taken from a sheriff holding it under attachments, measure of damages is the value at the time of the taking, with interest, not exceeding the amount required to satisfy the writs.—Merchants' Nat. Bank v. McDonald, Neb., 88 N. W. Rep. 492.

14. ATTORNEY AND CLIENT—Compensation of Laymen Performing Legal Services.— A person performing services in the prosecution of a lawsuit at the request of a party thereto is entitled to reasonable compensation therefor, though not an attorney.—Miller v. Ballerino, Cal., 67 Pac. Rep. 1046.

15. BANKS AND BANKING — Director's Knowledge as Chargeable to Bank.—That a borrower was officially connected with a bank as director is insufficient to charge it with notice of its fraudulent purposes in negotiating a loan.—Southern Commercial Sav. Bank v. Slattery's Admr., Mo., 66 S. W. Rep. 1069.

16. BENEFIT SOCIETIES—Unequal Rights. — Contract of mutual insurance company held void, as creating unequal rights in certain members of the company.—Robison v. Wolf, Ind., 62 N. E. Rep. 74.

17. BILLS AND NOTES—Notary's Fees for Protest.—Fees of notary public for protesting bank check are recoverable against the drawer and drawee.—German Nat. Bank v. Beatrice Nat. Bank, Neb., 88 N. W. Rep. 480.

18. BILL OF EXCEPTIONS—Part of Record.—A bill of exceptions does not become a part of the record unless filed.—City of Indianapolis v. Tansel, Ind., 62 N. E. Rep. 85.

19. BREACH OF THE PEACE— Blasphemy. — Evidence that defendant called witness a God damn liar was sufficient to justify a conviction of breach of the peace.—Johnson v. State, Tex., 66 S. W. Rep. 1097.

20. BUILDING AND LOAN ASSOCIATIONS—Defense of Usury in Foreclosure.—A borrower of a building and loan company making a settlement with the company, and receiving his share of the profits, will not be heard to object that such loan was usurious in a suit to foreclose a mortgage given to secure a balance due from him.—Tootle v. Singer, Iowa, 88 N. W. Rep. 446.

21. BUILDING AND LOAN ASSOCIATIONS—False Representations as Defense to Foreclosure. — False representations made to secure a subscription to building association held a defense to a suit to foreclose a mortgage made by the stockholder. — Hartman v. International Building & Loan Association, Ind., 62 N. E. Rep. 64.

22. CARRIERS—Ejecting Drunken Passenger.—A railroad company had a right to eject a violent drunken passenger, and incurred no liability therefor; no more force being used than was necessary. — Chesapeake & O. Ry. Co. v. Saulsberry, Ky., 66 S. W. Rep. 1051.

23. CARRIERS—Seating Capacity of Cars.— A passenger, in a action for injuries, held not chargeable with knowledge of the seating capacity of the cars composing the train.—Farnon v. Boston & A. R. Co., Mass., 62 N. E. Rep. 254.

24. CARRIERS—Workmen on Free Pass as Passenger.—Workmen riding to and from work in a conveyance furnished by their employers held employees, and not passengers.—Bowles v. Indiana Ry. Co., Ind., 62 N. E. Rep. 94.

25. CHAMPERTY AND MAINTENANCE—Deeds.— A deed is champertous, and void, if executed, when another was in the adverse possession of the land, though such possession had not continued for 15 years.— Logan v. Phenix, Ky., 66 S. W. Rep. 1042.

26. CONSTITUTIONAL LAW— Act Providing for Damages Irrespective of Benefits for Land Taken by Corporation.—Const. art. 1, § 14, providing that damages to land taken by a corporation shall be assessed irrespective of benefits, is contrary to the fourteenth amendment of the federal constitution, granting all persons equal protection of the laws. — Beveridge v. Lewis, Cal., 67 Pac. Rep. 1040.

27. CONTINUANCE — Probability of Securing Absent Witness.—Under Burns' Rev. St. 1894, § 413, it was proper to refuse a continuance for absent witness, where no probability of obtaining his testimony within a reasonable time was shown.—Dunnington v. Syfers, Ind., 62 N. E. Rep. 29.

28. CONTRACTS—Compromise of Prior Invalid Contract.—New contract having been made in compromise of a controversy over a prior agreement, the invalidity of such prior agreement held immaterial in an action to enforce the latter contract. — Dunbar v. Dunbar, Mass., 62 N. E. Rep. 248.

29. CONTRACTS—Defense of Invalidating After Full Execution.—A party cannot be estopped to set up the invalidity of a contract, because fully executed, where it is forbidden by statute or contrary to public policy.—Robison v. Wolf, Ind., 62 N. E. Rep. 74.

30. CONTRACTS—Public Policy.—A contract providing that a private crossing over a railroad shall be left open is not against public policy.—Gulf, C. & S. F. Ry. Co. v. Clay, Tex., 66 S. W. Rep. 1115.

31. CORPORATIONS—Bona Fide Attempt to Incorporate.—A *bona fide* attempt to incorporate held to create a *de facto* corporation, which could not defend an action upon the plea that it was not a corporation when the cause of action accrued.—Huntington Mfg. Co. v. Schofield, Ind., 62 N. E. Rep. 106.

32. CORPORATIONS—Estoppel as to Full Paid Stock.—Where a corporation issues capital stock, and represents it as fully paid, and causes it to be so listed on the stock and bond exchange, it is estopped to claim the stock is invalid as against a *bona fide* purchaser, even if the stock was in fact issued without consideration.—Smith v. Martin, Cal., 67 Pac. Rep. 779.

33. CORPORATIONS—Foreign Corporations.—Foreign corporation doing business in state without complying with Laws 1899, ch. 68, cannot sue on any contract arising out of its business.—G. Heilman Brewing Co. v. Piemeisl, Minn., 88 N. W. Rep. 441.

34. CORPORATIONS—Mortgage to Directors.—A mortgage of all the property of an insolvent corporation by three of the directors to secure debts for which the directors were sureties is void.—Swift & Co. v. Dyer-Veatch Co., Ind., 62 N. E. Rep. 248.

35. CORPORATIONS—Preferring Debts.—Officers of an insolvent corporation cannot prefer debts to third persons for which they are obligated as sureties.—Merchants' Nat. Bank v. McDonald, Neb., 88 N. W. Rep. 492.

36. COSTS—Fees for Transcript.—A county held liable to defendant in a criminal case for fees paid by him to the official stenographer for transcript of the shorthand notes.—Clinton County v. Martin, Ohio, 62 N. E. Rep. 129.

37. COUNTIES—Issue of Bonds.—Proposition to issue county bonds for internal improvement, and result of vote, must be entered on county records, and notice of adoption published, before such bonds can be legally issued. — Wilber v. Wyatt, Neb., 88 N. W. Rep. 499.

38. COURTS—Officers—Compensation. — County official held not entitled to retain fees and salary paid him in accordance with a holding of the supreme court, reversed during his continuance in office.—Sudbury v. Board of Commissioners of Monroe County, Ind., 62 N. E. Rep. 45.

39. CREDITORS' SUIT—Rights of Intevener.— A intervener, in an action in the nature of a creditors' bill, acquires a lien on the fund from the date of interven-

tion.—Merchants' Nat. Bank v. McDonald, Neb., 88 N. W. Rep. 492.

40. CRIMINAL EVIDENCE—Presumption of Good Character.—The defendant in a rape case, in which there is no evidence of his character, is not entitled to an instruction that the law presumes that he has a good character until the contrary is shown.—Addison v. People, Ill., 62 N. E. Rep. 285.

41. CRIMINAL LAW—Charge as to Circumstantial Evidence.—Charge as to circumstantial evidence, that the jury must believe accused committed the offense, is not erroneous because of omitting the words "and no other person." — Ramirez v. State, Tex., 66 S. W. Rep. 1101.

42. CRIMINAL LAW—Measure of Time of Statutory Sentence.—The statute authorizing a jail sentence of not less than one month for aggravated assault does not mean a calendar month.—Yeary v. State, Tex., 66 S. W. Rep. 1106.

43. CRIMINAL TRIAL—Interest of Juror. — Interest of juror in the company whose store defendant was charged with burglarizing held ground for new trial, defendant not having known it.—State v. Thompson, Utah, 67 Pac. Rep. 789.

44. CRIMINAL TRIAL—Newly-Discovered Evidence.—Newly-discovered evidence in a prosecution for murder that defendant was known as "crazy John Rinkard" is inadmissible to show insanity.—Rinkard v. State, Ind., 62 N. E. Rep. 14.

45. CRIMINAL TRIAL—Quotient Verdict by Jury.—A verdict fixing a fine and imprisonment, in pursuance of an agreement to add the amount and length of time fixed by each juror and divide the sum by the number of jurors, held improper.—Good v. State, Tex., 66 S. W. Rep. 1099.

46. CRIMINAL TRIAL—Remarks of District Attorney.—The court on appeal will not consider the propriety of the remarks of the district attorney, where such remarks are not verified by bill of exceptions.—Garza v. State, Tex., 66 S. W. Rep. 1098.

47. DAMAGES—For Loss of Arm.— Where plaintiff, a boy of 10 years, was so injured while at work in defendant's factory as to necessitate the amputation of his right arm, a verdict of $2,875 was not excessive.—American Lead Pencil Co. v. Davis, Tenn., 66 S. W. Rep. 1129.

48. DAMAGES—Itemizing Damages.—Defendant in an action for personal injuries is not entitled to have the jury itemize plaintiff's damages.—Citizens' St. R. Co. v. Heath, Ind., 62 N. E. Rep. 107.

49. DEATH — Damages for Death of Child.—In an action for death of a child seven years of age, verdict assessing $1,525 damages held not excessive.—City of Omaha v. Bowman, Neb., 88 N. W. Rep. 521.

50. DEATH—Joinder with Action for Pain and Suffering.—A cause of action for death cannot be properly joined with one for the pain and suffering of the decedent.—Lewis' Admr. v. Taylor Coal Co., Ky., 66 S. W. Rep. 1044.

51. DEEDS — Mental Incapacity. — Where a testator destroys his will, and executes a deed to one other than the devisee, because of a sudden unjustified antipathy to the devisee, it is insufficient to show mental incapacity. — Mallow v. Walker, Iowa, 88 N. W. Rep. 452.

52. DEEDS — Presumption of Delivery.—Under Civ. Code, §§ 1055, 1951, 1959 and 1961, where a deed is produced in court by the grantee and offered in evidence without qualification by the opposing party, delivery of the deed at its date should be presumed.—McDougall v. McDougall, Cal., 67 Pac. Rep. 778.

53. DEEDS — Proving Execution and Delivery by Parol.—Though a mining claim can only be conveyed by a deed in writing duly executed and delivered, the due execution and delivery of such deed, never recorded and now lost, may be proven by parol testimony.—Scott v. Crouch, Utah, 67 Pac. Rep. 1068.

54. DISMISSAL AND NONSUIT—Irregular Designation of Parties.—Where defendant is sued and served by her full name, and is mentioned in the pleadings and summon by her initials, the court does not lose jurisdiction by dismissal of the action as to person designated by initial letters.—Nebraska Loan & Trust Co. v. Kroener, Neb., 88 N. W. Rep. 499.

55. DIVORCE — Effect of Finding that Defendant Deserted Plaintiff.—A finding in a divorce action that defendant deserted plaintiff on a certain day is a finding on defendant's affirmative defense of desertion, and in effect that plaintiff did not desert defendant on that date.—De Toina v. De Toina, Cal., 67 Pac. Rep, 1045.

56. DOWER—Land Held Under Title Bond. — Under Ky. St. § 2142, widow held not entitled to dower in land which the husband held under title bond, but sold and conveyed before his death.—Smallridge v. Hazlett, Ky., 66 S. W. Rep. 1043.

57. DRAINS—To Set Aside Establishment of Drainage District.—In a proceeding to set aside the establishment of a drainage district, an instruction charging the petitioners with notice of all facts as to owners of land which a diligent inquiry would have disclosed held properly refused.—People v. Barnes, Ill., 62 N. E. Rep. 207.

58. EJECTMENT—Invalidity of Plaintiff's Patent.—In ejectment, evidence of the invalidity of plaintiff's patent held properly rejected, where the defendants did not connect themselves with it or claim superior equities to it.—Phillips v. Carter, Cal., 67 Pac. Rep. 1031.

59. EJECTMENT—Joinder of Parties.—Persons holding separate and distinct portions of a tract of land cannot be joined as parties defendant in ejectment to recover the entire tract.—Becker v. Stroeher, Mo., 66 S. W. Rep. 1083.

60. EMBEZZLEMENT—By Agent.—Where witness requested defendant to keep money for him, and defendant consented, he was an agent of the witness, within the meaning of Burns' Rev. St. 1901, § 2022, and might be convicted of embezzlement thereunder.—Wynegar v. State, Ind., 62 N. E. Rep. 38.

61. EMBEZZLEMENT—By Agent or Bailee.—On a prosecution for embezzlement of jewelry intrusted to accused as agent and bailee, an instruction, if one assumes to act as agent or bailee," etc., held not erroneous in using the word "assumes."—People v. McLean, Cal., 67 Pac. Rep. 770.

62. EMINENT DOMAIN—Acquiescence in Encroachment on Rights of Railroad.—Where a street railway company acquiesces in the encroachment on its rights in a street by a railroad company on its promise to pay all resulting damages, ejectment cannot be maintained.—Fresno St. R. Co. v. Southern Pac. R. Co., Cal., 67 Pac. Rep. 773.

63. EMINENT DOMAIN—Assessment of Damages.—In condemnation proceedings for a right of way for a railroad, an instruction that the jury are to assess damages according to the "cash market value" of the property taken held not erroneous. — Conness v. Indiana, I. & I. R. Co., Ill., 62 N. E. Rep. 221.

64. EMINENT DOMAIN—Considering Benefits.—In condemning land for a railroad, the jury may consider benefits to the land not taken, though such benefits also accrued to other land in the vicinity.—Beveridge v. Lewis, Cal. 67 Pac. Rep. 1040.

65. EMINENT DOMAIN—Piling Rubbish in Front of Place.—The act of a street railroad company in tearing up the street preparatory to building its road, and piling ties and rails in the street, is not such a damage to an abutting property owner as will authorize an injunction to restrain the construction of the road.—Nagel v. Lindell Ry. Co., Mo., 66 S. W. Rep. 1090.

66. EQUITY—Action to Recover on Reformed Insurance Policy.—Action to reform an insurance policy,

and recovery on the contract as reformed, held to present an equitable issue triable at equity term.—Imperial Shale Brick Co. v. Jewett, N. Y., 62 N. E. Rep. 167.

67. EQUITY—Pleading.—Omission of essential averments in cross petition may be cured by allegations in the answer, amounting to an admission of facts on which the right to relief depends.—Hargreaves v. Tennis, Neb., 88 N. W. Rep. 486.

68. EQUITY—Report of Auditors.—The report of persons appointed as auditors in a suit in equity will be treated as the report of a master.—Town of Falmouth v. Falmouth Water Co., Mass., 62 N. E. Rep. 255.

69. ESTOPPEL—Public Officer and State as to Compensation.—No question of estoppel as to compensation can arise between a citizen, performing services as a public officer for compensation fixed by law, and the state, county, or city receiving the same.— Gallaher v. City of Lincoln, Neb., 88 N. W. Rep. 505.

70. EVIDENCE—As to Value of Goods.— Where goods sued for were to some extent shopworn, etc., witness, whose only knowledge of value was derived from invoices, etc., held incompetent to testify as to value. — Merchants' Nat. Bank v. McDonald, Neb., 88 N. W. Rep. 492.

71. EVIDENCE—Character of Work Done. — In an action on a paving contract, evidence as to the character of the work in the street after the date when the work had been accepted by the street superintendent held incompetent.— Thomason v. Richards, Cal., 67 Pac. Rep. 1056.

72. EVIDENCE—Judicial Notice.—The supreme court will take judicial notice that the general act for the incorporation of cities and villages in the state of Illinois is in force in a particular city.— Bessette v. People, Ill., 62 N. E. Rep. 215.

73. EVIDENCE—Judicial Notice.—The court will not take judicial notice that a defendant is a resident of Austria, because he affixes to his name a title of nobility.—De Toina v. De Toina, Cal., 67 Pac. Rep. 1045.

74. EVIDENCE—Parol Evidence Affecting Written Instruments.—Parol evidence held admissible to show real consideration given for a trust deed and notes secured thereby, though the trust deed recited a different consideration.—Street v. Robertson, Tex., 66 S. W. Rep. 1120.

75. EVIDENCE—Parol Evidence to Show Want of Consideration.—Parol evidence held admissible to show want of consideration for a written agreement, where the consideration expressed was not contractual, but by way of recital.—Citizens' St. R. Co. v. Heath, Ind., 62 N. E. Rep. 107.

76. EVIDENCE—Photographs.—Admission of Photograph of the yard in which an employee was injured held not error.—Attix v. Minnesota Sandstone Co., Minn., 88 N. W. Rep. 436.

77. EVIDENCE—Report of Deceased Physician.— A report of a physician, since deceased, describing the condition of a person injured in an accident, is a declaration, within St. 1898, ch. 535, relating to admissibility in evidence of declarations.—O'Driscoll v. Lynn & B. St. R. R., Mass., 62 N. E. Rep. 3.

78. EXCEPTIONS, BILL OF—Proper Filing.—Where it does not appear that what purports to be the bill of exceptions containing the evidence was filed after being signed by the judge, the evidence is not before the court.—Tretheway v. Peek, Ind., 62 N. E. Rep. 59.

79. EXECUTORS AND ADMINISTRATORS — Proceeding Where Administrator Dies or Absconds.—Where an administrator or guardian dies, or absconds, or is beyond the power of the court, the proper method, in order to ascertain whether he is liable, and to what extent, so as to bind the sureties on his official bond, is by proceeding in the nature of a civil action, wherein the sureties are made parties.—Reither v. Murdock, Cal., 67 Pac. Rep. 784.

80. EXECUTORS AND ADMINISTRATORS—Profits as New Assets.—Profits in the hands of an administrator, accruing from the continuance of a business in which intestate was a partner, held new assets, within Pub. St. ch. 136, § 11, recoverable in a creditors' suit, otherwise barred by limitations. — Copeland v. Fifield, Mass., 62 N. E. Rep. 249.

81. EXECUTORS AND ADMINISTRATORS —, Right to Set Aside Fraudulent Conveyance.—Administrator of an estate may maintain an action against a decedent's grantee to set aside a conveyance as fraudulent as to decedent's creditors.— Mallow v. Walker, Iowa, 88 N. W. Rep. 452.

82. FOOD—Fixing Food and Drug Standards. — The provision of the pure food law (Acts 1899, p. 189), requiring the board of health to make rules as to the standards of foods and drugs, held not a delegation of legislative authority.—Isenhour v. State, Ind., 62 N. E. Rep. 40.

83. FOOD—Formaldehyde in Milk as an Adulteration. —An affidavit charging defendant with violation of the pure food law (Acts 1899, p. 189), held not insufficient for want of an allegation that formaldehyde contained in the milk charged to have been adulterated was a substance poisonous or injurious to health.—Isenhour v. State, Ind., 62 N. E. Rep. 40.

84. FORGERY—What is Meant by "Uttering."—An instruction that the "uttering" of a fictitious instrument in passing it, knowing it to be fictitious, held not error where it was not intended as a definition of the crime, but only of the word.—People v. Nishiyama, Cal., 67 Pac. Rep. 776.

85. FRAUDULENT CONVEYANCES — Allegations in Petition to Set Aside.—Suit to set aside fraudulent transfer of property held in the nature of a creditors' bill, and maintainable without allegation that action at law is not adequate.—Hargreaves v. Tennis, Neb., 88 N. W. Rep. 486.

86. FRAUDULENT CONVEYANCE — Fraudulent. — In a suit to set aside a conveyance as fraudulent, allegations that the deed was made to hinder and delay creditors, and was fraudulent, without specifications, are insufficient.—Burnham v. Boyd, Mo., 66 S. W. Rep. 1088.

87. FRAUDULENT CONVEYANCES—Right of Wife Suing for Divorce.—A judgment for alimony for the wife in an action by her for divorce is not a necessary prerequisite to entitle her to attack a conveyance by the husband of his property as fraudulent and void. — De Ruiter v. De Ruiter, Ind., 62 N. E. Rep. 100.

88. GAMING—Indictment.—Under Pen. Code, art. 388, prohibiting gaming with dice, but providing that no person shall be indicted under such section for playing any such game at a private residence, an information which fails to negative the fact that the gaming was at a private residence is bad.—Borders v. State, Tex., 66 S. W. Rep. 1102.

89. GAS—To Regulate the Rates.—A city council has no authority, under Rev. St. §§ 2478, 2479, to compel a gas company, without its assent, to furnish gas at a rate at the option of the consumer.—Logan Natural Gas & Fuel Co. v. City of Chillicothe, Ohio, 62 N. E. Rep. 122.

90. GIFTS—Presumption of Fraud.—Where a gift from parent to child is neither just nor reasonable, and the circumstances suggest fraud, the burden is on the donee to overcome presumption arising from such circumstances.—Gibson v. Hammang, Neb., 88 N. W. Rep. 500.

91. GRAND JURY—Disqualification of Juror to Pass on Second Charge for Same Offense.—Under Pen. Code, § 896, subd. 6, grand jurors who have found an indictment against a defendant are disqualified from again passing on a second charge against him for the same offense.—People v. Hansted, Cal., 67 Pac. Rep. 763.

92. GUARDIAN AND WARD—Right of Guardian to Foreclose.—Objection that there was no allegation, in a complaint by a guardian for the foreclosure of a mort-

gage, of any assignment to the guardian by his predecessor in office, held technical, when made by a party merely claiming some subordinate interest in or lien on the premises.—Penrose v. Winter, Cal., 67 Pac. Rep. 772.

93. GUARDIAN AND WARD— Right to Cancel Guardian's Deed.—On an action to surcharge a settlement made by a guardian, brought in the county in which the guardian qualified, the court had jurisdiction to cancel a deed executed by the guardian conveying land to the ward located in another county.—Dawkins v. Hough, Ky., 66 S. W. Rep. 1047.

94. HIGHWAYS — Erection of Building in a Public Street. — Erection of building in a public street held an invasion of the rights of the public and fee owner, entitling the latter to maintain ejectment therefor.—Northern Pac. Ry. Co. v. Lake, N. Dak., 88 N. W. Rep. 461.

95. INDICTMENT AND INFORMATION—Failure to Make a Letter Plain. — Where a complaint was against George D., the information was not insufficient, because the letter "D" was not completely made, owing to failure of the ink to trace a portion of it. — Dodson v. State, Tex., 66 S. W. Rep. 1047.

96. INSOLVENCY—Rights of Grantee and Creditors.—Where an insolvent conveyed land in consideration of future support, grantee held entitled to residue remaining after satisfaction of claims of insolvent's creditors.—Mallow v. Walker, Iowa, 88 N. W. Rep. 452.

97. INSURANCE—Construction.—An insurance policy capable of two constructions should be considered most strongly against the company.— Imperial Shale Brick Co. v. Jewett, N. Y., 62 N. E. Rep. 167.

98. INSURANCE—License on Premiums.—Under a city ordinance requiring insurance companies to pay annually as a license tax a sum on every $100 "of premiums received on business done in the city," the tax must be based on premiums received on new policies, and not upon premiums on outstanding policies.—Metropolitan Life Ins. Co. v. Darenkamp, Ky., 66 S. W. Rep. 1125.

99. JUDGMENT—Error in Review. —In a proceeding to review a judgment, the only errors which can be considered are such as might have been considered, had the case been appealed directly. — State Building & Loan Assn. v. Brackin, Ind., 62 N. E. Rep. 91.

100. JUDGMENT—Issue of Execution.— The right of a judgment plaintiff to commence an action on his judgment, in the absence of any statutory provision to the contrary, is not barred or suspended by the issuance of an execution.—Wells, Fargo & Co. v. Vansickle, U. S. C. C., D. Nev., 112 Fed. Rep. 398.

101. JUDGMENT—Motion to Set Aside.— A motion to set aside a judgment rendered in absence of defendant's counsel, accompanied by an affidavit of merits, held sufficient to authorize setting the judgment aside. —Scottish Union & National Ins. Co. v. Tomkies, Tex., 66 S. W. Rep. 1109.

102. JURY—Misdescription in Affidavit for Special Jury.—Description of the person making affidavit for special jury as deputy assistant district attorney, when there was no such office, held not ground for challenge of the panel drawn.—People v. Hall, N. Y., 62 N. E. Rep. 170.

103. JURY — Peremptory Challenges. — Under Pen. Code, § 1123, where a juror is discharged because of illness during the impanelling of the jury, defendant having employed some of his peremptory challenges, held entitled to all peremptory challenges that he had in the first instance.—People v. Zeigler, Cal., 67 Pac. Rep. 754.

104. JURY—Waiver.—Jury trial may be waived, not only in the manner prescribed by Gen. St. 1894, § 5385, but by unequivocal acts showing a willingness and an intention to do so. — Poppitz v. German Ins. Co., Minn., 88 N. W. Rep. 438.

105. JUSTICES OF THE PEACE — Deputizing Private Persons.—A justice may deputize a private person to serve a summons in replevin, though defendant in the action may be a sheriff.—Mysenburg v. Leisure, Neb., 88 N. W. Rep. 478.

106. LANDLORD AND TENANT—Foreclosing Landlord's Lien.—In an action against a tenant to foreclose landlord's lien, joined with an action against a junior mortgagee, an allegation that the mortgagee is asserting title to property subject to the lien is sufficient.—Cardwell v. Masterson, Tex., 66 S. W. Rep. 1121.

107. LARCENY — Evidence of Brand on a Cow. — Evidence of a brand on a cow claimed to be the mother of a stolen calf is not admissible in a prosecution for the theft of the calf.—Wallace v. State, Tex., 66 S. W. Rep. 1102.

108. LICENSES—Taxing Business of Horseshoeing.—Under Const. 1870, art. 9, § 2, the general assembly has the right to lay a tax upon the business of horseshoeing, although section 1, specifying the objects and subjects of taxation, does not mention horseshoeing.—Bessette v. People, Ill., 62 N. E. Rep. 215.

109. LIFE INSURANCE—Assignability.—Paid-up policy payable to wife of insured, where original policy was payable to insured's representatives, held assignable without writen consent of husband.—Dannhauser v. Wallenstein, N. Y., 62 N. E. Rep. 160.

110. LIMITATIONS—Payment on Account.—Payment on account by one other than the debtor without his consent will not toll the running of the statute of limitations.—Mizer v. Emigh, Neb., 88 N. W. Rep. 479.

111. MALICIOUS PROSECUTION—When Damages are Recoverable.—Damages are recoverable for malicious prosecution in a civil action, where there has been no restraint of person or seizure of property.—McCormick Harvester Mach. Co. v. Willan, Neb., 88 N. W. Rep. 497.

112. MANDAMUS—Jurisdiction.—Under Const. art. 6, §§ 2, 12, the original jurisdiction of the supreme court in *mandamus* cases is limited to the protection of the rights of the state and to affect official duties affecting the general public.—People v. City of Chicago, Ill., 62 N. E. Rep. 179.

113. MANDAMUS—To Compel Permission to Inspect Corporate Books.—Under Const. art. 12, § 14, Civ. Code, § 877, and Code Civ. Proc. §§ 1085, 1086, *mandamus* may issue to enforce a stockholder's right to inspect the corporate books, though the answer sets up improper motives and a desire to injure the business.—Johnson v. Langdon, Cal., 67 Pac. Rep. 1050.

114. MANDAMUS—To Compel Supervisors to Let Contract.—Under the San Francisco charter and Code Civ. Proc. § 1085, *mandamus* will not issue to compel supervisors to let contract for printing to lowest bidder, they having rejected all bids.—Stanley-Taylor Co. v. Board of Supers. of City and County of San Francisco, Cal., 67 Pac. Rep. 783.

115. MANDAMUS — To Compel Treasurer to Accept Tender. — *Mandamus* lies to compel a city treasurer to accept a certain sum tendered in payment of a license tax and to issue a receipt therefor, and to compel the city clerk upon the presentation to him of such receipt to issue a license.—Metropolitan Life Ins. Co. v. Darenkamp, Ky., 66 S. W. Rep. 1125.

116. MARRIAGE — Disproving Marriage. — Proof of want of marriage license and certificate of officiating clergyman performing a marriage held not sufficient to disprove the marriage in a collateral action involving the legitimacy of issue.—Franklin v. Lee, Ind., 62 N. E. Rep. 78.

117. MASTER AND SERVANT—Failing to Inspect Machine.—Experienced planing machine operator held guilty of contributory negligence in failing to inspect machine by which he was injured before attempting to use it.—Wyman v. Clark, Mass., 62 N. E. Rep. 245.

118. MASTER AND SERVANT—Fellow-Servants.—Per-

sons drilling holes for blasts and loading them held fellow-servants, though one takes the lead and gives directions.—Johnson v. Portland Stone Co., Oreg., 67 Pac. Rep. 1013.

119. MASTER AND SERVANT — Punitive Damages for Injury to Inexperienced Boy.— Where an inexperienced boy of 10 years, employed in defendant's factory, was injured by an unprotected pulley, a charge that punitive damages might be awarded if defendant was found guilty of gross negligence, or acted in reckless disregard of the safety of the child, was not error.—American Lead Pencil Co. v. Davis, Tenn., 66 S. W. Rep. 1129.

120. MASTER AND SERVANT—Protection from Strikers. —The law imposes no obligation upon the master to furnish a guard to protect the servant from a mob of strikers.—Lewis' Admr. v. Taylor Coal Co., Ky., 66 S. W. Rep. 1044.

121. MECHANICS' LIENS—Premature Filing.—Where a subcontractor furnished material, and his claim remained unsatisfied, the filing of a lien when there remained but seven or eight hours of one man's work held not premature.—Genest v. Las Vegas Masonic Bldg. Assn., N. M., 67 Pac. Rep. 748.

122. MISTAKE—Mutual Mistake of Fact.—A settlement made under a mutual mistake of fact may be set aside at the instance of the party whose negligence caused the mistake.—State Sav. Bank v. Buhl, Mich., 88 N. W. Rep. 471.

123. MORTGAGES — Agreement to Extend Time. — Agreement extending time of payment of a note and trust deed, held binding on the mortgagee, though signed only by the mortgagors; it being ratified by the trustee.—Kranz v. Uedelhofen, Ill., 62 N. E. Rep. 239.

124. MORTGAGES — Counsel Fee as Lien on Land.— Where a mortgage, providing for a counsel fee on foreclosure, does not provide that such fee shall be secured by the mortgage, it is not a lien on the land.— Lowenthal v. Coonan, Cal., 67 Pac. Rep. 1033.

125. MORTGAGES—Duty of Appraisers. — Appraisers in mortgage foreclosure proceedings held not required to set out in their return the evidence on which they acted; and this, whether defendants interest be a freehold or fee.—Omaha Land & Trust Co. v. Keck, Neb., 88 N. W. Rep. 520.

126. MORTGAGES — Erroneous Decree as Affecting Sale.—That a foreclosure decree erroneously directed the sheriff to execute the same and return within 60 days held not ground for refusing to confirm the sale. —Young v. Wood, Neb., 88 N. W. Rep. 528.

127. MORTGAGES—Irrigation Plant.—The owners of water rights held to be proper parties to institute suit to remove the lien of a trust deed of the system of an irrigation canal company.—New La Junta & Lamar Canal Co. v. Kreybill, Colo., 67 Pac. Rep. 1026.

128. MORTGAGES—Parol Proof.—Parol evidence is admissible to show that a deed absolute on its face is in fact a mortgage.—Matchett v. Knisely, Ind., 62 N. E. Rep. 87.

129. MORTGAGES—Proving Absolute Deed to be Mortgage.—Whether an absolute deed is a mortgage depends on the intention of the parties, to be gathered from their conduct, declarations, and papers. — Sander v. Ayres, Neb., 88 N. W. Rep. 526.

130. MUNICIPAL CORPORATIONS — Assessments for Street Improvements.—Where in a suit to collect a street assessment, the court finds that the assessment exceeds the special benefits conferred, it can determine the amount that should be assessed.—Walsh v. Sims, Ohio, 62 N. E. Rep. 120.

131. MUNICIPAL CORPORATIONS—Giving City Rights by Statute Not Given by Charter.—Act June 11, 1897, Laws 1897, p. 283, in so far as it may confer on certain municipalities the right to regulate occupations not given by charter held invalid under Const. 1870, art. 4. § 22.—Bessette v. People, Ill., 62 N. E. Rep. 215.

132. MUNICIPAL CORRORATIONS — Ordinance in Conflict with State Law. — A municipal ordinance, prohibiting pool selling on horse races and punishing any saloon keeper permitting pool selling on his premises, is void, as in conflict with a state law licensing the selling of pools on horse races.—*Ex parte* Ogden, Tex., 66 S. W. Rep. 1100.

133. MUNICIPAL CORPORATIONS — Powers of City Officers. — Persons dealing with city officers must ascertain that the provisions of the statutes applicable to the contract have been complied with.—City of Wellston v. Morgan, Ohio, 62 N. E. Rep. 127.

134. MUNICIPAL CORPORATIONS—Provisions for Liability of Contractor for Any Damage Resulting.—A contract for street improvements, providing that all loss or damage arising from the nature of the work shall be sustained by the contractor, is void. — Blochman v. Spreckels, Cal., 67 Pac. Rep. 1061.

135. MUNICIPAL CORPORATIONS—Reducing Police or Fire Departments.—Membership of police or fire department may be reduced for economic reasons without a hearing.—State v. Moores, Neb., 88 N. W. Rep. 490.

136. MUNICIPAL CORPORATIONS — Remonstrance to Street Assessment.—A street assessment, void as contrary to the provisions of Finlayson's St. Ry. Law, p. 61, § 6. and *Id.* p. 84, § 8, held not validated by abutting owner's failure to file remonstrance allowed by section 11.—De Haven v. Berendes, Cal., 67 Pac. Rep. 786.

137. NAVIGABLE WATERS — Accretion — Rivers With Soft Banks.—Law of accretion held to apply to the Missouri river, notwithstanding the swiftness of its current and the softness of its banks make the changes more rapid and extensive than in most rivers.—De Long v. Olsen, Neb., 88 N. W. Rep. 512.

138. NEGLIGENCE—Ability of Railroad to Avoid Injury.—Judgment for plaintiff, struck by defendant's street car, will not be disturbed, though he was negligent; there being evidence that the motorman saw his peril in time to avoid the accident.—Lee v. Market St. Ry. Co., Cal., 67 Pac. Rep. 765.

139. NEGLIGENCE—Allegation of Freedom From Contributory Negligence.—Complaint in a personal injury action against a street railway company held not demurrable, because containing no general allegation of freedom from contributory negligence. — Citizens' St. R. Co. v. Heath, Ind., 62 N. E. Rep. 107.

140. NEGLIGENCE—Burden of Proving Contributory Negligence.—In an action for injuries received by a servant, an instruction that the burden of proving the absence of contributory negligence was on the plaintiff was erroneous, under Horner's Rev. St. 1901, § 284a. —Wortman v. Minich, Ind., 62 N. E. Rep. 85.

141. NEGLIGENCE—Pleading Act of God in Discharge of Surface Water.—Act of God, relied on as defense to an action for injuries from surface water discharged onto land of an adjoining proprietor, must be specially pleaded.—Chicago, R. I. & P. R. Co. v. Shaw, Neb., 88 N. W. Rep. 508.

142. NEGLIGENCE—Selling Dangerous Drugs.— Badly spelled and ungrammatical letter ordering phosphorus of druggist held not to show such unfamiliarity with the drug as to render the druggist wanting in ordinary care in sending it without a specific warning.—Gibson v. Torbert, Iowa, 88 N. W. Rep. 443.

143. OFFICERS — Contract to Take Less Sum Than That Fixed by Law.—Contract of an appointed officer, whose salary is fixed by statute, that he will perform the duties of his office for a less sum than that prescribed by law, held contrary to public policy and void.—Gallaher v. City of Lincoln, Neb., 88 N. W. Rep. 505.

144. OFFICERS—Right to Hold Over.—Where the term of an appointive officer is fixed by law, and he is given no right to hold over until his successor is appointed, the fact that it has been the custom of his predecessor to so hold over and that inconvenience would result

from the office being vacant is no defense to a proceeding by the state in the nature of *quo warranto*. — State v. Lund, Mo., 66 S. W. Rep. 1062.

145. PARTIES—Partners as Defendants. — Where caption gives individual names of partners as defendants, and references to them are in the plural, the action will be held to be one against the individuals named. —Burke v. Unique Printing Co., Neb., 88 N. W. Rep. 488.

146. PARTITION—Trustee in Deed of Trust as Necessary Party.—A beneficiary or trustee in a deed of trust executed after the commencement of a partition suit by a party thereto is not a necessary party to the suit.—Becker v. Stroeher, Mo., 66 S. W. Rep. 1083.

147. PAUPERS—Liability of Township.—A township is not liable for medical services rendered non-resident pauper.—Gilligan v. Town of Grattan, Neb., 88 N. W. Rep. 477.

148. PLEADING— Amendment. — Though an amendment to a pleading, not changing its legal effect, may be allowed after the submission of the cause, it is error to permit at such time an amendment changing the issue or making a new one. — Mathews v. Rund, Ind., 62 N. E. Rep. 90.

149. PLEADING — Demurrer to Rejoinder. — Parties, having gone to trial on an issue joined by a rejoinder, cannot thereafter claim that demurrers filed to the rejoinders should have been carried back to the replications, and sustained on the ground that the issue was immaterial.—People v. Barnes, Ill., 62 N. E. Rep. 207.

150. PLEADING—Legal Capacity to Sue. — The statutory ground of demurrer that plaintiff has no legal capacity to sue refers to some legal disability of plaintiff, and not to the failure of the complaint to show a cause of action in him.—Pittsburgh, C., C. & St. L. Ry. Co. v. Iddings, Ind., 62 N. E. Rep. 112.

151. PLEADING—Uncertain Averments. — Where the only matters concerning which the complaint is uncertain are peculiarly within the knowledge of defendant, the latter will not be heard to complain thereof.—Schaake v. Eagle Automatic Can Co., Cal., 67 Pac. Rep. 759.

152. PRINCIPAL AND SURETY—Right of Co-surety Paying Debt.—A co surety, who pays the debt of the principal, may foreclose the mortgage executed to secure the sureties, without joining the other surety.—Morgan v. Street, Ind., 62 N. E. Rep. 99.

153. PROHIBITION—Revocation of Letters of Administration.—Where, notwithstanding an order revoking letters of administration, which operated as a *supersedeas*, the probate court asserts the right to enforce its order, the supreme court may prevent it from doing so by a writ of prohibition.— Cuendet v. Henderson, Mo., 66 S. W. Rep. 1079.

154. PUBLIC LANDS — Assignment of Desert Land Entryman.—A entry of land under the desert land act of 1877 is assignable during the life of the entryman, and on his death descends to his heirs.—Phillips v. Carter, Cal., 67 Pac. Rep. 1031.

155. PUBLIC LANDS—Burden of Proving Failure to Appraise School Lands.—One contesting an award of school land, on the ground that it had not been appraised at the price offered by the first appellant, has the burden of showing that the land was not so appraised.—Davis v. McCauley, Tex., 66 S. W. Rep. 1124.

156. QUIETING TITLE—Additional Complaint.—Under Burns' Rev. St. 1894, § 402, relating to supplemental pleadings, held error, in a suit to quiet title, to permit, after submission of the cause, an additional complaint demanding damages for destruction of an easement.—Mathews v. Rund, Ind., 62 N. E. Rep. 90.

157. QUO WARRANTO—To Recover Public Office.—*Quo warranto* by a citizen to recover a public office held fatally defective, where it fails to allege that he has applied to the prosecuting attorney to file the same, and he has refused.—Harpham v. State, Neb., 88 N. W. Rep. 489.

158. RAILROADS — Combustible Rubbish on Track Causing Fire.—Negligence of a railroad company in suffering fire to escape from its right of way may be established by proof of negligently permitting combustible rubbish and grass to accumulate on its right of way.—Pittsburgh, C., C. & St. L. Ry. Co. v. Iddings, Ind., 62 N. E. Rep. 112.

159. RAILROADS—Failure to Leave Openings in Fence. —In an action for animals drowned because of failure of defendant to leave openings in its right of way fence, that the flood was unprecedented held not to affect the question of defendant's negligence.—Gulf, C. & S. F. Ry. Co. v. Clay, Tex., 66 S. W. Rep. 1115.

160. RAILROADS—Liability to Trespasser.—A railroad company held not liable for injuries received by a trespasser on its tracks, in the absence of any showing of wilful negligence.—Cannon v. Cleveland, C., C. & St. L. Ry. Co., Ind., 62 N. E. Rep. 8.

161. RAILROADS—Power to Lease Road.—A provision in the charter of a railroad corporation, empowering it to "make contracts for operating said road, empowered the corporation to lease its road, but not so as to relieve it from liability for the negligence of the lessee.—McCabe's Admx. v. Maysville & B. S. R. Co., Ky., 66 S. W. Rep. 1054.

162. RECEIVERS—Cause of Action.—It is no ground of objection to the court's jurisdiction over the subject-matter in an action for a receiver that no joint cause of action is stated in the several plaintiffs.— Chicago & S. E. Ry. Co. v. Kenney, Ind., 62 N. E. Rep. 26.

163. RECEIVERS—Refusing to Postpone Hearing.—In an action for the appointment of a receiver, it was not error to refuse to postpone the hearing on tender of a bond for payment of the plaintiff's claims found due, which was not large enough to cover all their claims. —Chicago & S. E. Ry. Co. v. Kenney, Ind., 62 N. E. Rep. 26.

164. REMOVAL OF CAUSES—Because of Non-Residence. —A removal of a cause to a federal court cannot be had by a non resident defendant, where a resident defendant is properly sued jointly with him.—McCabe's Admx. v. Maysville & B. S. R. Co., Ky., 66 S. W. Rep. 1064.

165. SALES — Rescinding for Breach of Warranty.—A contract of sale, accompanied by a warranty of quality, cannot be rescinded for a breach of the warranty; the remedy being on the warranty.—H. W. Williams Transp. Line v. Darius Cole Transp. Co., Mich., 88 N. W. Rep. 473.

166. SCHOOL AND SCHOOL DISTRICTS—De Facto Officers.—Board of education elected in a school district organized from parts of two adjoining townships held to be *de facto* officers, and hence their legal existence was not open to collateral attack.—Gale v. Knopf, Ill., 62 N. E. Rep 229.

167. SET OFF—Claim Bought After Insolvency of Creditor.—A debtor of an insolvent bank cannot set off against his debt a claim against it which he bought after its insolvency.—Dyer v. Sebrell, Cal., 67 Pac. Rep. 1036.

168. SET OFF AND COUNTERCLAIM—Contract to Pay Debt to Defendant.—A contract between plaintiff and a corporation, by which the former was to pay a certain debt to defendant, held not to authorize defendant to set off such debt in an action against him by plaintiff.—Clare v. Hatch, Mass., 62 N. E. Rep. 250.

169. SIGNATURES—Validity of "Mark" or Other Symbol.—Written instruments by illiterate persons are properly attested by any mark, symbol, or character they may employ for that purpose.—Iowa Loan & Trust Co. v. Greenman, Neb., 88 N. W. Rep. 518.

170. SPECIFIC PERFORMANCE—Contracts Binding on Only One Party.—The court will not decree that one party shall specifically perform a contract which the other party, at his option, may refuse to carry out.—

Federal Oil Co. v. Western Oil Co., U. S. C. C., D. Ind., 112 Fed. Rep. 373.

171. STATUTES—Rule of Uniformity.—A constitutional rule of uniformity is not violated by statutes fixing jurisdiction of courts, if all courts of the same grade have jurisdiction of the same matters and equal authority in dealing with them.—Moores v. State, Neb., 88 N. W. Rep. 514.

172. STREET RAILROADS—Excavations on Street.—Under Pub. St. ch. 113, § 32, a street railway company is not liable for injuries caused by an excavation in the street made by authority of the city and within 18 inches of the tracks.—Leary v. Boston El. Ry. Co., Mass., 62 N. E. Rep. 1.

173. SUBROGATION—Assumption of Debt by Joint Mortgagor.—Where a father mortgaged land owned jointly with his children for his own debt, and thereafter the children assumed the debt, they were entitled to be subrogated to the rights of the mortgagee.—Ft. Jefferson Imp. Co. v. Dupoyster, Ky., 66 S. W. Rep. 1048.

174. TAXATION—Burden of Proving Irregularities of Tax Sale.—In a proceeding to foreclose a tax lien, tax sale certificate held *prima facie* evidence of compliance with statute, and burden of proving irregularities is on the party asserting them.—Darr v. Wisner, Neb., 88 N. W. Rep. 518.

175. TAXATION—Estoppel to Collect Taxes Marked "Paid." — Equitable estoppel held not to apply as against a municipality, so as to preclude it from collecting taxes marked "Paid" by an employee by mistake.—Philadelphia Mortgage & Trust Co. v. City of Omaha, Neb., 88 N. W. Rep. 523.

176. TAXATION—Omission of Other Taxable Property.—Omission of certain taxable property in a township from taxation will not invalidate the tax against the remaining property, though increasing the amount thereof.—Auditor General v. Sage Land & Improvement Co., Mich., 88 N. W. Rep. 468.

177. TAXATION—Right to Restrain.—Under Comp. St. 1901, ch. 77, art. 1, § 144, an injunction will not be granted to restrain the collection of taxes unless the assessment is void or the tax is levied for an illegal purpose.—Philadelphia Mortgage & Trust Co. v. City of Omaha, Neb., 88 N. W. Rep. 523.

178. TITLE—Constructive Notice by Recorded Trust Deed.—A recorded deed of land embraced in a trust deed, by a beneficiary in the trust deed, will not impart constructive notice of the interest of the grantee to a subsequent purchaser of the legal title, as the deed is not in the chain of title.—Becker v. Stroeher, Mo., 66 S. W. Rep. 1083.

179. TRIAL—Failure to State Reason for Excepting to Exclusion of Evidence.—Where evidence, the admission of which was discretionary, was excluded after objection to its admission for a certain purpose, counsel's failure to explain that it was offered for a different purpose was proper for consideration in determining whether the trial court abused its discretion.—Citizens' St. R. Co. v. Heath, Ind., 62 N. E. Rep. 107.

180. TRIAL — Instruction for Nominal Damages. — Where no instruction was asked as to the right of plaintiff to nominal damages, although his land was not in fact injured, he cannot complain that no such instruction was given.—Hommel v. Lewis, Ky., 66 S. W. Rep. 1041.

181. TRIAL—Interrupting Argument of Counsel.—A court is not required to interrupt the argument of counsel on the ground that it is unsound, and the opposing party, to save the question, must request an instruction thereon.—O'Driscoll v. Lynn & B. St. R. R., Mass., 62 N. E. Rep. 3.

182. TRIAL—Requests for Directed Verdicts by Both Parties. — Request for a directed verdict by both parties at the close of a trial held not necessarily a waiver of the right to have the cause submitted to the jury.—Poppitz v. German Ins. Co., Minn., 88 N. W. Rep. 438.

183. TRUSTS—Operating Words of Conveyance.—An instrument declaring a trust, but containg no operathe words of conveyance, or words showing an intention of the grantor to pass the legal title, is insufficient to create a legal estate in the grantee.—Becker v. Stroeher, Mo., 56 S. W. Rep. 1083.

184. VENDOR AND PURCHASER—Rescinding Because of Incumbrances. — Where the owner of land gives a bond for a deed free from incumbrances, and before the giving of a deed a portion of the land is condemned, the purchaser may rescind.—Kares v. Covell, Mass., 62 N. E. Rep. 244.

185. VENUE—Burden of Proving Non Residence.—The burden of proof is on a defendant to show that neither he nor his co-defendants resided in the county where the suit was brought at the time the action was commenced, if he would have a change of venue on that ground. — Quint v. Dimond, Cal., 67 Pac. Rep. 1034.

186. WASTE—Removal of Coal.—The removal of coal from lands by defendant, who held a determinable fee therein, the estate being conditioned to pass to plaintiff as an executory devise if defendant died without leaving children, held not such equitable waste as would authorize an injunction at the suit of plaintiff.—Gannon v. Peterson, Ill., 62 N. E. Rep. 244.

187. WATERS AND WATER COURSES — Enjoining Diversion of Water.—Code Civ. Proc. § 625, does not entitle a party to a jury trial of all issues in a suit to enjoin a diversion of water and for damages; but the court may make findings of fact and law on equitable issues.—Churchill v. Louie, Cal., 67 Pac. Rep. 1052.

188. WATERS AND WATER COURSES—Liability of Railroad Discharging Surface Water.—Where a railroad company so constructs its roadbed as to dam surface water and discharge unusual quantities of accumulated water on adjoining lands, it will be liable for the damage caused thereby.—Chicago, R. I. & P. R. Co. v. Shaw, Neb., 88 N. W. Rep. 508.

189. WATERS AND WATER COURSES—Paying Cost of Construction.—Under Acts 1898, ch. 66, authorizing a city to acquire the property of a water company, the city is required to pay the cost to the corporation of the construction of waterworks, and not the cost to the contractor.—Town of Falmouth v. Falmouth Water Co., Mass., 62 N. E. Rep 255.

190. WATERS AND WATER COURSES—Right to Store Water for Subsequent Discharge.—Persons engaged in transporting logs on a natural stream held not entitled to store water and suddenly discharge the accumulation, so as to overthrow and wash away the banks of the stream.—Brewster v. J. & J. Rogers Co., N. Y., 62 N. E. Rep. 164.

191. WITNESSES—Cashier's Testimony of Transactions With Deceased Borrower.—The cashier and stockholder of a bank held not disqualified, by Rev. St. 1899, § 4652, from testifying as a witness to a transaction with a borrower, since deceased, and its discount committee, in negotiating a loan.—Southern Commercial Sav. Bank v. Slattery's Admr., Mo., 66 S. W. Rep. 1066.

192. WITNESSES — Conversations With Deceased in Presence of Another.—Code, § 4604, held not to render witness incompetent to testify, where conversations were between decedent and another in the presence of witness; he taking no part.—Mallow v. Walker, Iowa, 88 N. W. Rep. 452.

193. WITNESSES—Credibility.—The state may prove that defendant had been charged with theft, as affecting his credibility.—Click v. State, Tex., 66 S. W. Rep. 1104.

194. WOODS AND FORESTS — Inheritance.—Plaintiffs, asserting as heirs title to growing trees, must allege and prove that their ancestor owned the land at the time of his death, and that they were his only children, or that they claim by conveyance from children not joined as plaintiffs.—Gayheart v. Sibley, Ky., 66 S. W. Rep. 1041.